Supreme Court, U.S.
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No.

IN THE

# Supreme Court of the United States

LYNN STUTER, BYRD STUTER and MONICA STUTER,

*Petitioners,*

*v.*

STEVENS COUNTY SHERIFF DEPARTMENT,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1) Does this Supreme Court's decision in *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989) preclude municipal liability under 42 U.S.C. § 1983 if a citizen exercising First Amendment expression seeks police protection against criminal harassment directed at the citizen for the exercise of those rights, and law enforcement's response not only fails to protect constitutional rights, but increases the danger to the citizens for exercising said rights?

2) Does this Supreme Court's ruling in *DeShaney v. Winnebago County Dept. of Social Services*, alter this court's longstanding holdings in *Monell v. New York City Dept. of Social Services,* 436 U.S. 658 (1978), and *City of Canton, Ohio v. Harris*, 489 U.S. 378 (1989), which allow for 42 U.S.C. § 1983 liability against a municipality where that municipality's policy of inaction results in deliberate indifference to, and failure to protect, constitutional rights of citizens with whom law enforcement comes into contact?

3) If an affirmative municipal policy of non-enforcement of criminal law against criminal perpetrators is evidenced, while law enforcement simultaneously limits a citizen from protecting themselves from harassors, may a citizen claim a due process violation and damages under 42 U.S.C. § 1983?

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Appendix 7a-24a - Memorandum Opinion of the United States District Court for the Eastern District of Washington, granting In part Defendant's Motion For Summary Judgment dated March 9, 2004 and filed March 12, 2004

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## OPINIONS AND ORDERS ENTERED BELOW

The unreported decision of the United States Court of Appeals for the 9th Circuit was entered May 12, 2006. *Petitioner's Appendix ("Pet.App") 3a-6a.* The decision and its attendant judgment, *Pet.App. 1a-2a,* affirmed a June 9, 2004 dismissal on summary judgment of the above matter by the United States District Court for the Eastern District of Washington. *Pet.App. 25a-63a.* The latter dismissal followed a March 9, 2004 Memorandum Opinion and Order granting Defendant's motion for partial summary judgment. *Pet.App. 7a-24a.*

## STATEMENT OF JURISDICTION

The United States Court of Appeals decision was filed May 12, 2006. *Pet.App. 1a.* This court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

**U.S. Const. Amend. I**:

**Freedom of Religion, Speech and Press; Peaceful Assemblage; Petition of Grievances.**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

**U.S. Const. Amend. XIV:**

**Section 1.** * * *No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 **Civil action for deprivation of rights**

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...* * *

## STATEMENT OF THE CASE

This case involves a 42 U.S.C. § 1983 complaint filed by a Plaintiff family, Lynn, Byrd and Monica Stuter, against the Defendant Stevens County's Sheriff's Department for the department's refusal to properly address ongoing, open, public criminal harassment of the Plaintiff family, whose outspoken views on educational funding (verses athletics funding) were widely known in the community, by groups of local teenagers over a period of

years. *Pet.App. 67a et seq., including 79a, para. 59.* Plaintiffs' complaint alleges that the Defendant Department violated Plaintiffs' First Amendment constitutional rights by alleged conspiracy with third party criminal harassors, and/or alleged due process violations through the Department's failure to train its deputies which amounted to deliberate indifference to Plaintiffs' constitutional rights, and for law enforcement action which itself affirmatively increased the third party danger to Plaintiffs.

The evidence at summary judgment established that from 1994 through the filing of this complaint in August 2002, groups of teenagers increasingly harassed and punished Plaintiffs for the Plaintiff mother's outspoken views of educational reform, including educational funding verses athletic funding.[1] *See e.g. Pet.App. 69a-70a.* Plaintiffs received much negative community feedback regarding their views. *Pet.App. 70a, para. 7.* The Plaintiff mother and her family consistently called the Defendant Sheriff's Department for protection. *Pet.App. 71a.* Over the years, the Defendant Sheriff's Department responded, but the

[1] The forms of harassment engaged in by the teenagers against the family are identified only in part in the Trial Court's order of June 9, 2004. *Pet.App. 30a-38a.* Evidence was that the teenagers' harassment grew over the years from eggs and pumpkins thrown at the house in 1994, to cars driving past the house yelling obscenities, to, by 1997, explosives thrown onto Plaintiffs' lawn, teenagers shooting reams of paint balls at the house from cars, teenagers sneaking up to the back of the Plaintiff's house through the woods at night to paintball the home while the family slept, bricks thrown at the home, cars of teenagers driving by in the middle of the night, honking and shouting obscenities, four wheel drive vehicles with "glass pack pipes" driving off the roadway onto the grass in front of the family home tearing up the median, and by 1999, M-70 firecrackers thrown onto the property, having been taped to eggs to allow for more distance. These actions went on through the year, with the "road rallies" identified *infra* occurring on a predictable basis.

Department did not criminally cite teenagers, or warn any of them of the potential for such action.

The most public displays of harassment towards Plaintiffs were annual homecoming day "road rallies," where cars full of unruly teenagers would drive through the local community before jamming up the roadway in front of the Plaintiffs' home for up to 45 minutes, honking, exposing themselves, shooting paintballs, yelling obscenities, and attempting to threaten and intimidate the Plaintiffs with property damage and physical harm. *See e.g. Pet. App. 72a.* The Defendant Department was made aware of these rallies in advance, and often had patrol cars cruising or parked in the area. While Defendant deputies would tell teenagers to "go home" at some point, and break up the rallies, no criminal citations or warnings issued. Ultimately, in the year 2000, the Department handed out traffic infractions for illegal u-turns made by the teenagers during their harassment of Plaintiffs. *Pet.App. 78a, para. 54(e), 79a, para. 58.*

Plaintiffs felt terrorized in their own home. *Pet. App. 74a, para. 31.* When Plaintiff Lynn Stuter requested that more be done, Defendant Deputies characterized the teenagers' harassing actions toward the family as "free speech." *Pet.App. 74a, para. 33.* Plaintiffs alleged that law enforcements' presence, combined with its inadequate and ratifying behavior, increased, prolonged and perpetuated the danger to the Plaintiffs. *See Pet.App. 78a, para. 55, 81a, para. 68, 84a, para. 80.* And in fact, over the years, while the Department was responding to Plaintiffs continued calls, the criminal harassment became so pervasive as to become a high school tradition. Evidence was taken from former harassors—now adults—attesting that underclassmen were

required to participate in the harassment of the family as part of the tradition.

Because of department failure to quell the criminal activity against them, Plaintiffs nearly ceased public advocacy. *Pet.App. 75a, para. 35.*

Evidence produced by Plaintiffs indicated that local deputies had gone to the same small school as the harassers, and knew some of the harassers personally. On at least one middle-of-the-night police stop of a vehicle which had been reported by Plaintiffs to have just participated in harassment, and was near the Plaintiff's home, the suspect teenagers in the vehicle were not even identified by name in the accompanying police report, contrary to police procedure.

A Plaintiff's expert attested that Defendant's actions fostered the environment created, allowed it to continue, and failed to protect the Plaintiffs through the years.

On the "Homecoming" night of Sept. 29, 1999, after some years of being the victims of harassment and annual "road rallies," Plaintiff Lynn Stuter positioned her vehicle to block the roadway in front of her home. She then stood in the roadway with a shotgun to prevent the teenagers from driving down her street. *Pet.App. 77a-78a; 33a-34a (Order).* She was promptly confronted by Defendant sheriff's deputies, and ordered off the roadway. Defendant deputies requested charges against Plaintiff for criminal disorderly conduct. *Pet.App. 34a (Order).* The harassment of the Plaintiffs thereafter continued. *Pet.App. 34a-38a (Order).*

In 2002, the Plaintiff family brought a claim under 42 U.S.C. § 1983 asserting that the Defendant law enforcement in Stevens County acting under color of statute, had engaged in a policy of inaction, i.e. a municipal policy of failure to train, which amounted to a failure to protect Plaintiffs' constitutional rights in deliberate indifference to their constitutional rights. *See Pet.App. 68a, 80a-81a, paras. 66-68, 71, 83a.* Plaintiffs alleged that the nature of Defendant's actions and inaction increased and prolonged the danger to the Plaintiffs. *See e.g. 78a, para. 55. Pet.App. 26a-27a (Order).* Plaintiffs also claimed that deputies acted intentionally in alignment with third party actors (framed as retaliation, but clarified as conspiracy) *Pet.App. 26a. (Order).*

The District Court dismissed the Plaintiffs' claim on summary judgment. *Pet.App. 26a et seq.* Citing this Supreme Court's decision in *DeShaney v. Winnebago County Dept. of Social Services*, 489 US 189 (1989), the District court held that, 1) as to action under color of law, the Defendant Sheriff's Department did not create the harassment, and that a theory of "insufficient response making (Plaintiffs) more vulnerable is foreclosed under *DeShaney*;" 2) as to the alleged failure to protect resulting from municipal policy, no municipal policy was shown by a failure to act, per *Deshaney*; and 3) Plaintiffs could not establish a due process violation through police failing to adequately respond or investigate, again, per *DeShaney. Pet.App. 42a, 52a-54a, 55a, 58a, 61a.*

On appeal to the Ninth Circuit, the Appellate court upheld the dismissal of the Plaintiffs' due process claim, also citing *DeShaney. Pet.App. 5a.* The Ninth Circuit Court held that, even if evidence existed of inadequate response by the

Defendant Department to complaints of harassment and vandalism, Plaintiffs had no right to protection from the acts of third parties. *Id.* The Ninth Circuit also concluded that the state created danger exception to the general rule in *DeShaney* did not apply, as the harassing activities predated involvement by the Defendant Department, and the "record is devoid of evidence that any affirmative action by the Department increased the danger posed to the Stuters" in the required manner. *Pet.App. 6a.*

The Ninth Circuit also dismissed the Plaintiffs' First Amendment claim, holding that, notwithstanding inadequate response, "there is no evidence that the Department's action (or inaction) was motivated by a desire to chill the Stuter's speech." *Pet.App. 5a.*

Plaintiffs, Petitioners herein, seek review by this United States Supreme Court of the dismissal of their claim on the grounds stated.

## REASONS FOR ALLOWANCE OF THE WRIT

The Ninth Circuit's holding has decided an important question of federal law arising from this Supreme Court's language in *DeShaney v. Winnebago County Dept. of Social Services,* 489 U.S. 189 (1989). And in doing so, it has entered a decision in conflict with the second Circuit's decision in *Dwares v. City of New York*, 985 F.2d 94, 99 (2d Cir. 1993).

While *DeShaney* holds that there is no affirmative duty on the part of the state to protect citizens from third party actions, the opinion also provides for exceptions to this

rule—notably, where persons are in state custody, and cannot thus provide for themselves because of state limitations on their ability to act for themselves. But since *DeShaney*, the federal circuits have also considered, and have begun to evolve, a "state created danger theory." In this line of reasoning, law enforcement action which places people directly in harm's way, can create an affirmative duty of action on the part of the state, whereby 42 U.S.C. § 1983 liability can follow for failure to act in a manner which protects the citizens involved. And in 1993, in *Dwares*, 985 F.2d 94, the Second Circuit applied that state created danger theory to a situation where the police did not themselves originally place the citizen in harm's way, but where police oversaw, monitored and refused to assist a citizen, who was exercising First Amendment expression, from being assaulted by third parties. The court held such police acts to be affirmative acts, and to constitute ratification of criminal conduct, which increased the danger to the citizens targeted, and formed a proper basis of liability.

The Ninth Circuit's decision in this case refuses to apply this affirmative duty of the state to protect citizens under attack for their exercise of free speech. It holds that no basis for 42 U.S.C. § 1983 liability exists, and thus, no protection exists from criminal conduct directed against citizens exercising First Amendment rights. It does so on the premise that this court's *DeShaney* decision holds that insufficient response by law enforcement neither renders persons more vulnerable, nor establishes policy, nor establishes state action.

The Ninth Circuit Court's ruling so narrowly construes this Court's *DeShaney* decision as to remove any accountability for police agencies who intentionally refuse to protect citizens exercising first amendment rights from third party harassment. Thus, while sound policy and constitutional reasons exist for declining to impose 42 U.S.C. § 1983 liability for most good faith responses to crime calls which are deemed inadequate in retrospect, Petitioners here urge this court to address whether the evolving state created danger theory is sound, and if so, whether it must of necessity encompass liability for a law enforcement response which ratifies criminal conduct targeted at *rights* expression.

Absent such review, the Ninth Circuit's reading of the *DeShaney* decision holds that citizens exercising constitutional expression rights have no police protection, unless the local police feel like giving it to them.

## ARGUMENT

### 1. REVIEW IS WARRANTED TO RESOLVE THE ACCEPTANCE AND APPLICATION OF THE DANGER CREATION THEORY EXCEPTION TO *DESHANEY* WHERE STATE LAW ENFORCEMENT RATIFIES CRIMINAL BEHAVIOR AGAINST CITIZENS EXERCISING FREE SPEECH RIGHTS.

Petitioner here alleges that the Ninth Circuit's decision in this case is in conflict w[illegible] *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989), and with numerous federal circuits in holding that an

affirmative duty to act on the part of the state only applies where the state itself "creates" the danger. It is likewise in conflict with a Second Circuit decision of *Dwares v. City of New York*, 985 F.2d 94 (2d Cir. 1993), whereby this danger creation theory discussed within the federal circuits has properly evolved to the level of state liability when state ratification of criminal behavior prolongs or increases third party danger to citizens who are then harmed by those third parties.

In *DeShaney,* 489 U.S. 189, this United States Supreme Court held that a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause. [2] The Due Process Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. *Id.* at 195.

But this Supreme Court also held that, in certain limited circumstances, the Constitution *does* impose upon the State affirmative duties of care and protection with respect to particular individuals. *Id.* at 198. As an example, an affirmative obligation on the part of the state exists where a person is in state custody, and thus where a person's individual liberty is restrained by the state in a manner rendering that individual unable to care for himself. *Id.* at

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[2] This Court accepted review in 1989 of the failure to enforce issue "[B]ecause of the inconsistent approaches taken by the lower courts in determining when, if ever, the failure of a state or local governmental entity or its agents to provide an individual with adequate protective services constitutes a violation of the individual's due process rights...and the importance of the issue to the administration of state and local governments..." *DeShaney,* 489 U.S. at 194.

198-199, citing, e.g. *Estelle v. Gamble,* 429 U.S. 97 (1976), and *Youngberg v. Romeo,* 457 U.S. 307 (1982). And the dissent in *DeShaney* also noted the existence of other specific exceptions to this "no affirmative duty" rule, including a situation whereby the state monopolizes a particular path of relief, or forecloses opportunities for citizens to exercise constitutional rights. Such scenarios may impose upon the state certain positive duties. *DeShaney,* 489 U.S. at 207, citing *Schneider v. State,* 308 U.S. 147 (1939); *Hague v. Committee for Indus. Org.,* 307 U.S. 496 (1939); *United States v. Grace,* 461 U.S. 171 (1983).

The dissent in *DeShaney* also pointed out that in *Shelley v. Kraemer,* 334 U.S. 1 (1948), and *Burton v. Wilmington Parking Authority,* 365 U.S. 715 (1961), the Supreme Court had also suggested that a State may be found *complicit* in an injury, even if it did not create the situation that caused the harm. *DeShaney,* 489 U.S. at 207 (Brennan, J., dissenting, Marshall, J., and Blackman, J., joining).

Since the *DeShaney* decision, the various federal circuits have attempted to address the nature and theory of these *DeShaney* "affirmative duty" exceptions—evolving such a duty into that arising from situations where the state itself creates danger to people with whom state agents come into contact. In an exemplary 1995 decision of *Mark v. Borough of Hatboro,* 51 F.3d 1137 (3d Cir. 1995), the Third Circuit Court found a consistency in "state created danger" cases. Such cases "have four things in common: (1) the harm ultimately caused was foreseeable and fairly direct; (2) the state actor acted in willful disregard for the safety of the plaintiff; (3) there existed some relationship between the state and the plaintiff; (and) (4) the state actors used their authority to create an opportunity that otherwise would not

have existed for the third party's crime to occur." *Id.* at 1152-1153. While the *Mark* court failed to apply the theory to the case before it, the theory was later adopted by the Third Circuit in *Kneipp v. Tedder*, 95 F.3d 1199, 1211 (3d Cir. 1996).

By the time of the Ninth Circuit's decision in *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1061 (9th Cir. 2006), that court noted how the majority of circuits since the *DeShaney* decision had adopted the "state created danger" theory of affirmative duty as a basis for liability under 42 U.S.C. § 1983, indicating that the doctrine was "well established law in seven of our sister circuits." *Id.* at 1061, n. 1 citing *Butera v. District of Columbia,* 235 F.3d 637, 651 (D.C. Cir. 2001); *Dwares v. City of New York,* 985 F.2d 94, 98-99 (2d Cir. 1993); *Kneipp v. Tedder,* 95 F.3d 1199, 1201 (3d Cir. 1996); *Kallstrom v. City of Columbus,* 136 F.3d 1055, 1066-67 (6th Cir. 1998); *Reed v. Gardner,* 986 F.2d 1122, 1125 (7th Cir. 1993); *Freeman v. Ferguson,* 911 F.2d 52, 54-55 (8th Cir. 1990); *Uhlrig v. Harder,* 64 F.3d 567, 572 (10th Cir. 1995).

The D.C. Circuit in *Butera* stated: "We join the other circuits in holding that, under the State endangerment concept, an individual can assert a substantive due process right to protection by the [District of Columbia] from third-party violence when [District of Columbia] officials affirmatively act to increase or create the danger that ultimately results in the individual's harm." 235 F.3d at 651. The interesting language in *Butera* is the court's inclusion within the affirmative duty borders of the state's actions in "increasing" the danger, not simply creating it.

The evolution seems subtle. In *Kennedy v. City of Ridgefield,* no danger existed from any third party until police got involved. Police then actively created danger where none existed by disclosing a report of molestation to the alleged molester. 439 F.3d at 1057. In *Butera,* police officers affirmatively used a citizen as an undercover operative, thus creating the danger to him. 253 F.3d at 641. In *Kallstrom v. City of Columbus,* the city disclosed personal information from undercover police officer's personnel files to counsel for alleged drug conspirators; again, actually creating the danger. 136 F.3d at 1059. And in *Uhlrig v. Harder,* an activity therapist was killed by a mental hospital patient after state mental health administrators eliminated a special unit in the mental hospital that had been reserved for criminally insane, and thereby caused the transfer of the killer to the general hospital population. 64 F.3d at 567.

But other Circuit decisions have held that the state need not create the danger to allow for liability.

In *Ross v. United States,* 910 F.2d 1422 (7th Cir. 1990), a plaintiff whose son drowned was held to have stated a viable § 1983 claim where an arbitrary county policy prevented private assistance and failed to provide state assistance. *Id., cited in Reed v. Gardner,* 986 F.2d at 1126. And in *Freeman v. Ferguson,* 911 F.2d 52 (8th Cir. 1990), the Eighth Circuit found viable a suit in which the state "played a part in the creation of the danger," and took actions which rendered the Plaintiffs more vulnerable to such danger. *Id.* at 54-55. In particular, it was alleged that a close relationship existed between the Police Chief and a perpetrator who killed a mother and daughter. It was claimed that the violence the decedents were subjected to was not solely the result of private action, but was also the result of

an affirmative act by a state actor to interfere with the protective services which would have otherwise been available in the community. Such interference was asserted to have increased the vulnerability of decedents to the actions of the perpetrator. "Without such affirmative actions on the part of the chief of police, the danger faced by the Downens would have arguably been less." *Id.* The *Freeman* court concluded that the precedent had not yet established the extent to which the government must increase the danger of private violence before it assumes a corresponding duty to protect. *Id.* at 55.

The question in this Stuter v Stevens County petition for a writ involves third party actors. But it also involves ongoing harm which the Defendant did not originally create, but which the Defendant viewed, supervised in some cases, and failed to address or remedy as criminal behavior. And under such supervision, the harassment continued and escalated. This matter also involves criminal activity targeted at the Plaintiffs for their outspoken educational views.

The only "state created danger" decision nearing the same fact pattern is that of second circuit decision in *Dwares*, 985 F.2d 94, where the Plaintiff sued city, police officers, and another individual for violation of their civil rights in connection with the beating of the plaintiff during a demonstration that involved flag burning. In *Dwares,* a complaint, brought principally under 42 U.S.C. §§ 1983, 1985(3), and 1986, alleged that the Defendant City of New York and individual police officers conspired with private individuals to permit those private individuals, without threat of intervention by defendant police officers, to assault *Dwares* and to prevent *Dwares's* exercise of his First Amendment rights. Citing *DeShaney,* the Second Circuit

identified that affirmative state action may increase a danger to a victim from third parties' criminal conduct by ratification of third party criminal acts. The case holds that police presence, and failure to act or intervene while crimes are being openly committed against persons engaged in free speech expression, constitutes inherent ratification of the criminal behavior, which thereby creates more danger and implicates rights. *Id.* The *Dwares* Court cited the Eighth Circuit decision in *Freeman v. Ferguson,* 911 F.2d at 52 as corroboration for the idea that police presence and refusal to enforce laws against violence equates to ratification, and thereby increases the danger posed to potential victims by its very nature.

The Second Circuit held as follows:

> "We read the *DeShaney* Court's analysis to imply that, though an allegation simply that police officers had failed to act upon reports of past violence would not implicate the victim's rights under the Due Process Clause, an allegation that the officers in some way had assisted in creating or increasing the danger to the victim would indeed implicate those rights."

*Dwares,* 985 F.2d at 99.

The Ninth Circuit's decision in this Plaintiff's case distinguished *Dwares* on its facts—holding that the *Dwares* facts differed in the police's implementation of ratification—but the distinction is one without a difference. In *Dwares,* the complaint alleged that officers conspired with "skinheads" to permit the latter to beat up flag burners, and assured the

skinheads that unless they got "totally out of control" they would not be impeded or arrested. *Dwares,* 985 F.2d at 99. The Second Circuit's opinion discusses such police commentary as permission or verbal license given by the officers, and noted that ratification also arguably occurred through at least one criminal action occurring in the presence of the officers, which did not result in interference by police or arrest. The Second Circuit Court held that such facts properly permitted an inference that assault was an increased likelihood. *Id.*

Here, the Stuters produced even more dramatic evidence of ratification. This was not a one time situation of criminal harassment. Here, year after year, Defendant Deputies affirmatively both told and showed teenagers that the only law enforcement response to their criminal harassment of the Plaintiffs would be Sheriff's deputies telling the teenagers to go home, breaking up their rallies at some point, or issuing traffic tickets. Under the *Dwares* ruling, such state action equates to reassurance that affirmative criminal conduct is not criminal. Such reassurances to persons engaged in trying to terrorize other citizens for or as a result of rights expression were here alleged to have resulted from either state complicity, or from intentional actions by the deputies via their openly stated belief to Plaintiff Lynn Stuter that such criminal behavior was free speech. The end result was ratification, and continuing escalating harassment of this family.

The Ninth Circuit's holdings in this case that, because criminally harassing activities predated any involvement by the department, then impliedly the department could not have created the danger, and its holding that the "record is devoid of evidence that any

affirmative action by the Department increased the danger posed to the Stuters," both fail to recognize that the entire theory behind, e.g. *Dwares* and *Freeman*, *supra*, is that "state created danger" arises when third party danger is clear, and where police are present and ratify the behavior, and thus inherently increase the danger to the citizen involved.

As well, one recognized touchstone behind the existence of an affirmative duty on the part of the state in "failure to act" liability is a person's inability to act for themselves. *See e.g. Kneipp v. Tedder,* 95 F.3d at 1209. In quelling criminal action against herself, Plaintiff Lynn Stuter did ultimately go into the street one night in anticipation of a predicted "road rally" with a shotgun and a car blockade, right in front of deputies, to try and dissuade the forming of the anticipated riot in front of her home. Plaintiff was thereupon promptly accosted by a Defendant sheriff's deputy, ordered off the roadway, and cited for criminal "disorderly conduct." Under such circumstances, a situation akin to the Third Circuit's *Kneipp v. Tedder* reasoning, and that of custodial cases, appears. Police limited Plaintiff's freedom to act on her own behalf, but would not protect her or her family from crimes against them either. *See e.g.* 95 F.3d at 1199. Under such circumstances, an affirmative duty to protect should arise. *See Wood v. Ostrander,* 879 F.2d 583 (9th Cir. 1989) *cert. den.* 498 U.S. 938 (1990).

The Ninth Circuit's decision in this case forecloses and abrogates the evolving line of "affirmative action" duty on the part of the state when third parties are actively and openly targeting person exercising free speech rights. This court should address this issue created by *DeShaney* and the subsequent conflict between this Ninth Circuit decision and the Second (and Eighth Circuit) as to how an affirmative

duty applies when citizens, exercising free speech rights, are under attack.

### 2. REVIEW IS WARRANTED TO ADDRESS THE NINTH CIRCUIT'S ABROGATION OF 42 U.S.C. § 1983 LIABILITY WHEN MUNICIPAL POLICIES OF INACTION, SUCH AS FAILURE TO TRAIN DEPUTIES PROPERLY, EVIDENCE DELIBERATE INDIFFERENCE TO CONSTITUTIONAL RIGHTS.

Another expressly established exception to the *DeShaney* rule is that of this Court's longstanding precedent regarding policies of inaction, whereby state policies of inaction amount to a failure to protect constitutional rights. *See Monell v. New York City Dept. of Social Services,* 436 U.S. 658 (1978); *City of Canton v. Harris,* 489 U.S. 378 (1989).

Under *Monell,* and *City of Canton,* a local government entity can be liable under 42 U.S.C. § 1983 if it has a policy of inaction, such as failure to train police in deliberate indifference to the rights of persons with whom the police came into contact, and such inaction amounts to a failure to protect constitutional rights. *Canton,* 489 U.S. at 388-389; *Monell,* 436 U.S. 694. Such a custom or policy of inaction must be the result of a conscious or deliberate choice to follow a course of action made by an official or officials responsible for establishing final policy. *See Pembaur v. Cincinnati,* 475 U.S. 469, 483-484 (1986). As noted in *Davis Next Friend LaShonda D. v. Monroe County Bd. of Educ.,* 526 U.S. 629, 642 (1999), liability arises, not

from individuals acts, but rather, from "an official decision by the recipient not to remedy the violation." *Id.*, quoting *Gebser v. Lago Vista Independent School Dist.*, 524 U.S. 274, 290 (1989).

Where a municipality's failure to train its employees in a relevant respect evidences a "deliberate indifference" to the rights of its inhabitants, then such s shortcoming may be properly thought of as a city "policy or custom" that is actionable under § 1983. *City of Canton,* 489 U.S. at 389. Deliberate indifference to a person's constitutional rights occurs when the need for more or different action, "is so obvious, and the inadequacy [of the current procedure] so likely to result in the violation of constitutional rights, but the policy makers...can reasonably be said to have been deliberately indifferent to the need." *Lee v. City of Los Angeles*, 250 F.3d 668, 682 (9th Cir. 2001), citing *Oviatt v. Pearce,* 954 F.2d 1470, 1477-78 (9th Cir. 1992) quoting *City of Canton,* 489 U.S. at 390. Whether a local governmental entity has displayed a policy of deliberate indifference is generally a question for the jury. *Lee,* 250 F.3d at 682.

Here, the Ninth Circuit has cited *DeShaney* in upholding a decision that Plaintiff had failed to establish such a policy, because police interaction cannot constitute a policy. But under *City of Canton v. Harris,* inaction clearly can constitute a policy; here, inaction constituted not only an affirmative policy of non-enforcement of criminal law, but also evidenced failure to train deputies, amounting to deliberate indifference to the constitutional rights of citizens with whom those deputies predictably came into contact.

But moreover, evidence also exists that this policy became the requisite "moving force" behind the violations, (*see e.g. City of Canton,* 489 U.S. 389), in that law enforcement believed this criminal harassment to be "free speech." Neither the District court nor the Ninth Circuit commented on this evidence. But a law enforcement position--openly taken--towards persons engaged in criminal behavior, whereby the behavior is characterized as "free speech" which cannot be restricted, cannot help but ratify further violations by those inclined to violate. This is the *Dwares* recognition that people who assault others, without interference from law enforcement who are present and watching, will likely be emboldened to prolong or continue the assault.

Here, evidence supports not only an affirmative and openly stated policy in and of itself occurring over the years, but the indifference of Stevens County to its deputies' obvious invalid and erroneous inability to distinguish between criminal behavior and free speech over a period of years, while call upon call was made by Plaintiffs to law enforcement. Such resulted in the Defendant Department thereupon not only refusing to provide proper protection to Plaintiffs, but in the Department's affirmatively ratifying the criminal conduct against these Plaintiffs, and prolonging and increasing the danger of continuing harm to Plaintiffs.[3]

This Ninth Circuit's use of *DeShaney* to thus hold that law enforcement must be the direct actor who creates the violation, and that failure to enforce the law of necessity involves no action, and thus no policy or liability, effectively

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[3] The escalating incidents involved confirmed that harassment not only continued, but grew more severe as it evolved into a high school tradition.

abolishes or repeals this Supreme Court's *City of Canton* line of reasoning. State inaction in the form of failure to train law enforcement in deliberate indifference to constitutional rights should continue to constitute a policy which can violate constitutional rights, and thereby be actionable under 42 U.S.C. § 1983.

## CONCLUSION

The Ninth Circuit Court of Appeals found insufficient evidence to support a 42 USC § 1983 claim, because the legal standard applied by that Court for 42 USC § 1983 liability is erroneous. Upon acceptance of the theories discussed, more than sufficient evidence exists for Petitioners' claim. For the foregoing reasons, Petitioners request that this Supreme Court grant review.

Respectfully Submitted,

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# APPENDIX 1a-2a – JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED AND ENTERED ON MAY 12, 2006

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

| | |
|---|---|
| LYNN STUTER, et al.,<br><br>Plaintiffs-Appellants,<br><br>v.<br><br>STEVENS COUNTY SHERIFF DEPARTMENT<br><br>Defendant-Appellee. | NO. 04-35589<br>D.C. NO. CV-02-00266-JLQ<br><br>JUDGMENT |

Appeal from the United States District Court for the Eastern District of Washington (Spokane).

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Eastern District of Washington (Spokane) and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by the Court, that the judgment of the said District Court in this cause be, and hereby is **AFFIRMED**. Each party shall bear its own costs on appeal.

Filed and entered Friday, May 12, 2006.

APPENDIX 3a-6a – MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT ARGUED AND SUBMITTED APRIL 12, 2006

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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|---|---|
| LYNN STUTER; BYRD STUTER; MONICA STUTER,<br><br>Plaintiffs-Appellants,<br><br>v.<br><br>STEVENS COUNTY SHERIFF'S DEPARTMENT,<br><br>Defendant-Appellee. | NO. 04-35589<br><br>D.C. NO. CV-02-00266-JLQ<br><br>MEMORANDUM** |

Appeal from the United States District Court
For the Easter District of Washington
Justin L. Quackenbush, Senior Judge, Presiding

Argued and Submitted April 12, 2006
Spokane, Washington

Before: FARRIS, THOMAS, and McKEOWN, Circuit Judges.

Lynn Stuter, her husband Byrd, and their daughter Monica appeal from the district court's grant of summary judgment in favor of defendant Stevens County Sheriff's Department ("the Department") in their 42 U.S.C. § action. We affirm. Because the parties are familiar with the factual and procedural history of this case, we will not recount it here.

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** This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

I

The district court properly granted summary judgment on the Stuter's First Amendment retaliation claim. "In order to demonstrate a First Amendment violation, a plaintiff must provide evidence showing that by his actions the defendant deterred or chilled the plaintiff's political speech *and* such deterrence was a substantial or motivating factor in the defendant's conduct." *Mendocino Envtl. Ctr. v. Mendocino County*, 192 F.3d 1283, 1300 (9th Cir. 1999) (internal quotations omitted) (emphasis added). Although there is evidence that the Department may have failed to respond adequately to the Stuters' numerous complaints of harassment and vandalism, there is no evidence that the Department's action (or inaction) was motivated by a desire to chill the Stuters' speech.

II

The district court also properly granted summary judgment on the Stuters' due process claim. The Due Process Clause does not include a right to protection from the actions of private parties. *See DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 195-6 (1989). The Stuters' contention that the Department's alleged violation constitutes a due process violation is foreclosed by the Supreme Court's recent decision in *Town of Castle Rock v. Gonzales*,—U.S.—, 125 S.Ct. 2796 (2005).

The "state created danger" exception to the general rule does not afford relief under the circumstances of this case. Under this doctrine, an individual's liberty interest in personal security may be violated when police "action creates or exposes an individual to danger which he or she

would not have otherwise faced." *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1061 (9th Cir. 2006). The predicate question under this analysis is whether the law enforcement officers took any "affirmative actions" that placed the Stuters "in danger that [they] otherwise would not have faced." *Id.* at 1063. In this case, the harassing activities predated any involvement by the Department, and the record is devoid of evidence that any affirmative action by the Department increased the danger posed to the Stuters in a manner sufficient to satisfy the *Kennedy* requirements.[1]

The Stuters' claims as they related to the criminal prosecution of Lynn Stuter are foreclosed by *Heck v. Humphrey*, 512 U.S. 477 (1994). *See Smithart v. Towery*, 79 F.3d 951, 952 (9th Cir. 1996) (per curiam) ("[I]f a criminal conviction arising out of the same facts stands and is fundamentally inconsistent with the unlawful behavior for which section 1983 damages are sought, the 1983 action must be dismissed").

III

In sum, the district court properly granted summary judgment on the Stuters' federal claims. Each party shall bear its own costs on appeal.

**AFFIRMED.**

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[1] This case is also unlike *Dwares v. City of New York*, 985 F.2d 94 (2nd Cir. 1993), cited by the Stuters, in which affirmative acts by the police emboldened the private actors. In *Dwares*, the police had informed skinheads that if the skinheads beat up individuals desecrating the flag, the police would not arrest the skinheads or interfere with their attacks. *Id.* at 99.

APPENDIX 7a-24a – MEMORANDUM OPINION AND ORDER **GRANTING IN PART** DEFENDANT'S MOTION FOR SUMMARY JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON ENTERED ON MARCH 9, 2004

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

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| LYNN STUTER, BYRD STUTER and MONICA STUTER, and as husband and wife,<br><br>Plaintiffs,<br><br>vs.<br><br>STEVENS COUNTY SHERIFF DEPARTMENT,<br><br>Defendant. | NO. CS-02-266-JLQ<br><br>MEMORANDUM OPINION AND ORDER **GRANTING IN PART** DEFENDANT'S MOTION FOR SUMMARY JUDGMENT |

BEFORE THE COURT is Defendant's Motion for Summary Judgment (Ct. Rec. 47). Plaintiffs are represented by **Mary Schultz**. Defendants are represented by **Michael McFarland** and **Christopher Kerley**.

Defendant seeks summary judgment that Plaintiffs are barred from asserting a claim arising from Lynn Stuter's conviction for disorderly conduct for her actions of September 29, 1999, because Plaintiff's 42 U.S.C. § 1983 claims would call into question the validity of that conviction. Defendant further asserts that any and all of Plaintiffs' claims arising before August 8, 1999 are barred by the applicable statute of limitations. Plaintiffs argue that the 1999 conviction is not the basis for the § 1983 claim, but rather the claim is based on Defendants [sic] actions, and inaction, spanning from 1994 through the filing of the complaint on August 8, 2002. Plaintiffs do argue, however, that the 1999 conviction should be allowed as evidence of policy. Plaintiffs also argue that the claim is timely because

the claim did not accrue until after August 8, 1999, and the continuing violation theory should apply.

## PRELIMINARY MATTERS

On January 14, 2004, at oral argument on this summary judgment motion, the parties were invited to submit supplemental briefing on *Nat'l. R.R. Passenger Corp. v. Morgan,* 536 U.S. 101 (2002) and the pattern or practice method of establishing a continuing violation. The parties were given until February 10, 2004, to submit the additional briefing, which was then extended, at the request of the parties, to February 13, 2004. Plaintiffs filed as part of their supplemental briefing two affidavits which submitted additional factual information. No supplemental affidavits were requested by the court, nor did Plaintiffs seek permission to file the additional affidavits. Defendant filed an objection to the supplementation of the factual record (Ct. Rec. 88), but then subsequently filed its own supplementary factual information (Ct. Rec. 111). Since both sides have submitted supplemental factual materials that may be of benefit to the court, the court will consider all three submissions. (Ct. Rec. 85, 86, 111).

Counsel are cautioned that they must strictly observe Local Rule 7.1 which prohibits the citation of unpublished opinions.

## BACKGROUND

As this is Defendant's motion, the evidence and inferences arising therefrom are viewed in the light most favorable to the Plaintiffs. The following facts are undisputed, unless otherwise noted.

Plaintiff, Lynn Stuter, has been an advocate of education reform since 1992. She actively participated in school board meetings and wrote letters to school board members. She was supported in these endeavors by Plaintiffs Byrd and Monica Stuter, respectively, her husband and daughter. One of Lynn's reform ideas was that the school should cease funding athletic activities in favor of emphasizing academics.

Plaintiffs live in the small community of Suncrest, and their views were not widely accepted by members of the school and community. In 1994 and 1995, Plaintiffs began to experience vandalism at their home in the form of eggs, pumpkins, and paintballs being thrown or shot towards their home. Several of these incidents were reported to Defendant, the Stevens County Sheriff's Department. During 1995 and 1996 the Plaintiffs also experienced "car rallys" [sic] of high school students driving by their home and threatening property damage, yelling obscenities and continued vandalism including eggs, tomatoes, and a brick being thrown at the home. In July of 1997, an explosive device was allegedly thrown into Plaintiff's yard in the middle of the night and left a "volleyball size hole" in the lawn. All of these incidents were reported to Defendant Sheriff's Department.

This harassment and similar acts as those described *supra* allegedly continued throughout 1997 and 1998. These events instilled fear in the Plaintiffs and they significantly decreased their public advocacy of education reform. Plaintiffs perceived that Defendant took no action to investigate or determine the perpetrators of harassment. In September of 1998, one of the incidents of harassment referred to as a "car rally" occurred and was videotaped by

Plaintiffs and shown to Defendant.

On September 29, 1999, in fear of another "car rally" Lynn Stuter's car was parked in the middle of the road and she stood near it with a shotgun. Defendant Sheriff's Department was called and Lynn was subsequently charged and convicted of disorderly conduct. Harassment and vandalism continued in 2000 and 2001, and this lawsuit was filed against Defendant on August 8, 2002.

## SUMMARY JUDGMENT STANDARD

The purpose of summary judgment is to avoid unnecessary trials when there is no dispute as the material facts before the court. *Northwest Motorcycle Ass'n v. U.S. Dept. of Agriculture*, 18 F.3d 1468, 1471 (9th Cir. 1994). The moving party is entitled to summary judgment when, viewing the evidence and the inferences arising therefrom in the light most favorable to the nonmoving party, there are no genuine issues of material fact in dispute. Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). While the moving party does not have to disprove matters on which the opponent will bear the burden of proof at trial, they nonetheless bear the burden of producing evidence that negates an essential element of the opposing party's claim and the ultimate burden of persuading the court that no genuine issue of material fact exists. *Nissan Fire & Marine Ins. Co. v. Fritz Companies*, 210 F.3d 1099, 1102 (9th Cir. 2000).

Once the moving party has carried its burden, the opponent must do more than simply show there is some metaphysical doubt as to the material facts. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1975).

Rather, the opposing party must come forward with specific facts showing that there is a genuine issue for trial. *Id.*

## DISCUSSION

### I. Heck v. Humphrey

Defendant argues that the Supreme Court's ruling in *Heck v. Humphrey*, 512 U.S. 477 (1994), precludes Plaintiffs from asserting any claim related to Plaintiff Lynn Stuter's 1999 charge and conviction for disorderly conduct. In *Heck* the Supreme Court held that a § 1983 damages claim that called into question the lawfulness of conviction or confinement was not cognizable under § 1983 at all. *Id.* at 487; see also *Harvey v. Waldron*, 210 F.3d 1008, 1013 (9th Cir. 2000) ("a § 1983 action that would call into question the lawfulness of a plaintiff's conviction or confinement is not cognizable, and does not, therefore, accrue until and unless the plaintiff can prove that his conviction or sentence has been reversed on direct appeal."). Plaintiffs concede that a § 1983 action may not be based upon actions which would render a conviction or sentence invalid unless the conviction has been reversed, expunged, or called into question by issuance of a writ of habeas corpus. (Ct. Rec. 60, p. 6).

Plaintiffs argue instead, relying on *Smithart v. Towery*, 79 F.3d 951(9th Cir. 1996), that this § 1983 action, if successful, would not demonstrate the invalidity of the 1999 disorderly conduct conviction and should thus be allowed to proceed. There is language in *Heck* that supports Plaintiffs [sic] argument: "when a [plaintiff] seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence". *Heck*, 512 U.S.

at 485. If it would, the complaint will be dismissed, if it will not then the action may proceed. *Id.* Plaintiffs do not assert a claim of false arrest, false imprisonment, malicious prosecution, unconstitutional conviction, or unconstitutional imprisonment. (Ct. Rec. 60, p. 12). See also *Muhammad v. Close*, _____S.Ct._____, 2004 WL 344163 (Feb. 25, 2004).

In *Smithart*, the court allowed a claim of excessive force to proceed because it found it would not imply the invalidity of plaintiff's conviction. In contrast, Plaintiffs in this case make a claim more akin to selective enforcement, and as Plaintiffs concede, selective enforcement is a potential defense to a criminal charge. *United States v. Christopher*, 700 F.2d 1253, 1258 (9th Cir. 1983). Plaintiffs attempt to convince the court that this selective enforcement claim is different because the law was selectively enforced against Plaintiff Lynn Stuter and selectively not enforced against the harassers. The court finds Plaintiffs' argument unconvincing. The Plaintiffs may not use the September 29, 1999 incident as an independent claim for damages under § 1983. Defendant's motion for summary judgment is **GRANTED IN PART**. Any claim based on the citation and subsequent conviction of Lynn Stuter for the September 29, 1999 incident is precluded.

**II. Retaliatory Arrest**

In paragraph 51 of the Complaint (Ct. Rec. 1), Plaintiffs make what appears to be a claim of retaliatory arrest based on the 1999 disorderly conduct conviction. Defendant seeks a ruling as a matter of law that Plaintiffs are precluded from making such claim. The court first notes that Plaintiff Lynn Stuter was not arrested, but rather she was cited and a

recommendation was made that charges be brought. Plaintiffs clarify in their briefing that they make no claim of false arrest or false imprisonment based on the 1999 conviction of Plaintiff Lynn Stuter. (Ct. Rec. 60, p. 12). Plaintiff Lynn Stuter admits she committed a criminal act. It appears that Plaintiffs no longer assert a claim of retaliatory arrest, and furthermore they may not assert such claim. A retaliatory arrest § 1983 claim is not cognizable because it would call into question the lawfulness of the conviction. *Heck v. Humphrey*, 512 U.S. 477 (1994). The recent Supreme Court decision in *Muhammad v. Close*, *supra*, is distinguishable in that Muhammad was seeking damages for pretrial confinement on a charge of which he was acquitted (threatening behavior) and not for damages on the insolence charge of which he was convicted, even though that charge may have been brought for retaliatory reasons.

**III. Statute of Limitations**

Defendant argues that Plaintiffs are precluded from asserting any claims under 42 U.S.C. § 1983 that arose before August 8, 1999, three years prior to the filing of the Complaint. The limitations period for § 1983 claims is determined by the state's statute of limitations for personal injury actions. *Wilson v. Garcia*, 471 U.S. 261, 279-80 (1985); *Azer v. Connell*, 306 F.3d 930, 935 (9th Cir. 2002). In Washington the applicable statute of limitations is three years. Wash. Rev. Code § 4.16.080(2). When a claim accrues is a question of federal law. *Azer*, 306 F.3d at 935. Under federal law, a claim accrues when the plaintiff knows or has reason to know of the injury which is the basis of the action. *Id.* at 936.

Plaintiffs argue that the claim did not accrue until

Plaintiffs became aware of a municipal policy of failing to enforce and "recognition of failure to enforce as a government policy may never have occurred, as Plaintiffs continued to call for assistance and help when harassed." (Ct. Rec. 60, p. 18). Plaintiffs' argument is contrary to the allegations in the Complaint. It is clear from the Complaint that as early as 1997 Plaintiffs perceived a "complete failure of police protection" and that after videotaping a "car rally" in September of 1998, Plaintiffs informed a sergeant at the department that legal action may be taken. (Ct. Rec. 1). Plaintiff Lynn Stuter also sent a letter to the Sheriff's Department in October of 1998 that referenced the families civil rights under "42 U.S.C. 1985(3)".

Plaintiff's argument that recognition of a failure to enforce may never have occurred is contrary to the record submitted in support of Plaintiffs' response to the summary judgment motion. Police reports of the incident of September 29, 1999, indicate that when officers arrived Plaintiff Lynn Stuter allegedly berated officers telling them that the problem had been on-going for four years, that she had called in 28 separate complaints, and the officers never did anything. This confrontation allegedly ended with Mrs. Stuter again threatening to sue the Sheriff's Department. Thus, when legal action was threatened in 1998, that date is the absolute latest that Plaintiffs could claim that they became aware of the total failure of the Defendant to respond to their harassment claims and the harassment cause of action had then accrued.

Nonetheless, Plaintiffs argue the "continuing violation" doctrine applies to their claim. When a tort involves continuing wrongful conduct, the statute of limitations does not begin to run until that conduct ends. *Flowers v. Carville*,

310 F.3d 1118 (9th Cir. 2002). However, the doctrine applies only where no single incident can fairly or realistically be identified as the cause of significant harm. *Id.* (citations and quotations omitted). A mere continuing impact from previous violations does not fall within the continuing violation exception. *Knox v. Davis*, 260 F.3d 1009, 1013 (9th Cir. 2001). Additionally, a plaintiff cannot bring a time-barred claim for a discrete discriminatory act even if it is related to acts that are not time-barred. *Carpinteria Valley Farms, Ltd. v. County of Santa Barbara*, 344 F.3d 822 (9th Cir. 2003). Therefore, if each alleged failure of Defendant to adequately investigate or effectively respond to Plaintiffs' reports of harassment is a discrete discriminatory act, then the continuing violation doctrine does not apply. In order to avoid this result, Plaintiffs argue that a policy or practice that operated at least in part during the limitation period satisfies the continuing violation doctrine. Plaintiffs also argue that the claim may not have accrued until after August 8, 1999 because Plaintiffs may not have been aware that the failure to enforce was a governmental policy.

**A. Continuing Violation Theory: Morgan and subsequent Ninth Circuit caselaw**

The most recent pronouncement in this area by the Supreme Court came in *Nat'l R. R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), an employment discrimination case. The explanation and discussion of the continuing violation theory in the title VII context is relevant and applicable to § 1983 actions. *Carpinteria Valley Farms v. Santa Barbara*, 344 F.3d 822, 829 (9th Cir. 2003)("Although *Morgan* was a Title VII case, and the present case is a § 1983 action, we have applied *Morgan* to bar § 1983 claims predicated on discrete time-barred acts,

notwithstanding that those acts are related to timely-filed claims.").

*Morgan* is important because therein the Ninth Circuit had held that under the continuing violation theory a plaintiff could sue on claims otherwise time-barred in two circumstances: 1) they are sufficiently related to incidents that fall within the statutory period; or 2) they are part of a systemic policy or practice of discrimination that took place, at least in part, within the limitations period. *Morgan v. Nat'l. R.R. Corp.*, 232 F.3d 1008, 1015-16 (9th Cir. 2000). In reversing the Ninth Circuit, the Supreme Court invalidated the Ninth Circuit's 'related acts' method of establishing a continuing violation, holding that discrete discriminatory acts are not actionable if time-barred, even when they are related to acts alleged in timely filed charges. *Id.* at 113; *Carpinteria*, 344 F.3d at 828. The Supreme Court did not consider the "pattern-or-practice" method. See *Morgan*, 536 U.S. 101 n.9 (2002)("We have no occasion here to consider the timely filing question with respect to "pattern-or-practice" claims..."). With respect to the hostile work environment claim, the Supreme Court stated: "We also hold that consideration of the entire scope of a hostile work environment claim, including behavior alleged outside the statutory time period, is permissible for the purposes of assessing liability, so long as an act contributing to that hostile environment takes place within the statutory time period." *Id.* at 105.

Also important in *Morgan* is the Court's footnote 7, page 114: "There may be circumstances where it will be difficult to determine when the time period should begin to run. One issue that may arise in such circumstances is whether the time begins to run when the injury occurs as opposed to

when the injury reasonably should have been discovered." The court did not resolve the issue because the plaintiff had been found by the District Court to have believed that he was being discriminated against at the time that all of the acts occurred. The plaintiff knew that each action was discriminatory, which solidified the finding that each act was a discrete discriminatory act. This is important in the case *sub judice* because Plaintiffs argue they may not have been aware of the policy of inaction or discrimination until some point within the 3-year limitations period. However, as stated *supra*, this argument is contrary to the record.

Returning now to *Carpinteria*, decided after *Morgan*, the court found that the time-barred acts could not be used to support claims of constitutional violations under § 1983. The court also held that, "[plaintiff] may use these time barred acts, however, as evidence to establish motive and to put his timely-filed claims in context." 344 F.3d at 829. Therefore, under *Carpinteria*, Plaintiffs may use the pre-1999 incidents not as a claim for damages but to show motive (why Defendant acted as it did in 1999 and after) and to add context.

The court turns now to Plaintiffs' contention at oral argument that this is a practice or policy claim rather than an instance of discrete discriminatory acts and should be allowed to proceed under the continuing violations theory. Ninth Circuit cases decided since *Morgan* shed light on the appropriate treatment of pattern-or-practice claims. One of the most relevant is *Cherosky v. Henderson*, 330 F.3d 1243 (9th Cir. 2003), in which United States Postal Service employees brought an action under the Rehabilitation Act. This may seem factually removed from a § 1983 claim, but the court alleviated this concern: "[T]he Supreme Court's

analysis of the continuing violations doctrine is not limited to Title VII actions. It applies with equal force to the Rehabilitation Act and to actions arising under other civil rights laws." *Id.* at 1246 n.3 (citing to *RK Ventures, Inc. v. City of Seattle*, 307 F.3d 1045 (9th Cir. 2002) which applied *Morgan* in a suit arising under 42 U.S.C. § 1983).

In *Cherosky* the Ninth Circuit commented that *Morgan* had "substantially limited" the continuing violations doctrine and framed the question before it as follows:

> In this case, we consider the impact of *Morgan* on employment decisions that occurred outside of the limitations period, but were made pursuant to an allegedly discriminatory policy that remained in effect during the limitations period. *Id.* at 1244.

The court concluded that *Morgan* precluded recovery under such circumstances, and noted that a discriminatory practice, though it may extend over a period of time and involve a series of related acts, remains divisible into a set of discrete acts. Legal action on the basis of each act must be brought within the statutory limitations period. *Id.* at 1247 (citations and quotations omitted). The Ninth Circuit has made this same statement in at least two other cases. See *Lyons v. England*, 307 F.3d 1092, 1108 (9th Cir. 2002) and *RAAD v. Fairbanks North Star Borough School Dist.*, 323 F.3d 1185, 1192 (9th Cir. 2003).

The *Cherosky* court stated that the alleged wrong occurs and accrues each time the discriminatory policy is implemented against the plaintiff. The court was unequivocal in its conclusion, "it would eviscerate *Morgan's* premise to circumvent timely filing requirements merely

because a plaintiff alleges that the acts were taken pursuant to a discriminatory policy." *Id.* at 1248.

*Morgan* and subsequent Ninth Circuit cases support the conclusion that Plaintiffs may not use the continuing violations theory to bring claims based on acts prior to August 8, 1999. However, under *Carpinteria* evidence of acts prior to August 8, 1999, may be relevant to provide context to claims arising from acts during the limitations period and to establish motive. That issue is not now before the court.

Plaintiffs may not have been aware in 1994, when the harassment first began and they first began reporting the activities to Defendant, that Defendant's ineffective or non-response was a practice, policy, or custom. It may have taken several instances of what Plaintiffs perceived as inadequate response before the discriminatory or harmful nature was apparent. However, it is clear from the record that Plaintiffs became aware of the allegedly wrongful and discriminatory actions or inactions of Defendant in 1997 or 1998. By that time, Plaintiffs observed a "complete failure of police protection", had consulted an attorney, and threatened legal action.

Because Plaintiffs did not file this action until August 8, 2002, they may not base a § 1983 claim for damages on actions or events that occurred prior to August 8, 1999.

## IV. Constitutional Basis for § 1983 Claim

This brings the court to another important question: what injury, of constitutional proportions, did Plaintiffs allegedly suffer at the hands of the Stevens County Sheriff's

Department? In the summary judgment briefing, Plaintiffs claim selective enforcement of the law, failure to train, and failure to supervise by the Defendant. Plaintiffs do not specify what constitutional harm resulted from these alleged failures. Plaintiffs refer to "violations of civil rights", "rights violations", and "constitutional violations". (Ct. Rec. 60). The abstract value of a constitutional right may not form the basis for § 1983 damages. *Memphis Community School Dist. v. Stachara*, 477 U.S. 299, 307 (1986). The first step in any action under 42 U.S.C. § 1983 is to identify the constitutional right allegedly violated. *Graham v. Connor*, 490 U.S. 386, 394 (1989). The complaint, however, is more clear than the summary judgment briefing and indicates Plaintiffs claim infringement of First Amendment rights.

There is also discussion in the briefing about whether Plaintiffs could establish an equal protection violation. To establish a § 1983 equal protection violation, Plaintiffs must show that the defendants, acting under color of state law, discriminated against them as members of an identifiable class and that the discrimination was intentional. *Flores v. Morgan Hill Unified School Dist.*, 324 F.3d 1130, 1134 (9th Cir. 2003). Plaintiffs must show Defendants intentionally discriminated or acted with deliberate indifference by reason of Plaintiff's membership in a protected class. *Id.* at 1135. "Deliberate indifference" will be found if Defendants [sic] response to the known harassment of Plaintiffs was in a manner that is clearly unreasonable. *Id.*

Plaintiffs clarified at oral argument on this summary judgment motion that they do not assert an Equal Protection claim. Plaintiffs characterize the claim as purely a First Amendment claim and assert no other constitutional violations.

## V. Supplemental Briefing

The court has thoroughly reviewed the supplemental briefing of the parties and remains convinced that the analysis set forth *supra* is correct. Plaintiffs have previously characterized their claim as a pattern/practice/policy claim, but now invite this court to analogize the situation to a hostile work environment claim. The court declines the invitation. The *Morgan* court clearly viewed hostile work environment claims as distinctly different, "different in kind". 536 U.S. at 115. The court also clearly stated that it was not deciding the pattern or practice issue. 536 U.S. at 115 n. 9.

Plaintiffs also raise two new theories in the supplemental briefing based on the discovery rule and equitable tolling. Plaintiffs argue that the discovery rule allows them time to discover all the essential facts of a cause of action before the limitations period begins to run. The record establishes Plaintiffs were aware of all the *essential* facts, and Plaintiff's contention that they had insufficient legal knowledge does not extend the timely filing period. The court also finds that application of the equitable tolling doctrine is not appropriate. There is nothing in the record to demonstrate that Defendant made false assurances or authoritative statements to mislead Plaintiffs as to the nature of their rights. Rather, it is clear from Plaintiffs' allegations, that Defendant was straightforward about not responding in the manner desired by Plaintiffs, and informed Plaintiffs that the Sheriff's Department was doing all it could do, while also observing the First Amendment rights of the students.

The court finds Plaintiffs' discovery rule and equitable tolling arguments to be unconvincing. Plaintiffs first

consulted a lawyer in 1996, and threatened to take legal action against the Sheriff's Department in 1998 and 1999. However, Plaintiffs did not attempt to consult another attorney until 2000 or file suit until 2002. The arguments made now that they were unaware of the injury or facts supporting the cause of action are contrary to the record. Plaintiffs' lack of knowledge concerning a specific cause of action does not support equitable tolling.

## CONCLUSION

Defendant seeks a summary judgment ruling that any of the Plaintiffs' § 1983 claims based on the September 29, 1999 incident and subsequent conviction of Plaintiff Lynn Stuter are precluded by the doctrines of *Heck v. Humphrey*. Summary judgment is appropriate and the motion is **GRANTED** as to this point.

Defendant also seeks summary judgment ruling that Plaintiffs § 1983 claims based on any incidents that occurred before August 8, 1999 are time-barred by the applicable three-year statute of limitations. Defendant's motion is **GRANTED** in that Plaintiffs cannot base a claim for damages on incidents occurring before August 8, 1999 because Plaintiffs were well aware of their injury and inaction by Defendant no later than 1998. The continuing violations doctrine does not apply. However, events occurring prior to August 8, 1999, may be relevant to establish motive and provide context to the actionable incidents which occurred subsequent to August 8, 1999. That issue should be raised by an appropriate motion in limine.

Accordingly,

**IT IS HEREBY ORDERED:**

1. Defendant's Motion for Partial Summary Judgment (Ct. Rec. 47) is **GRANTED** to the extent stated in this Memorandum Opinion and Order.

**IT IS SO ORDERED.** The Clerk is hereby directed to enter this Order and furnish copies to counsel.

**DATED** this 9th day of March, 2004.

/s/ Justin Quackenbush
JUSTIN L. QUACKENBUSH
Senior United States District Judge

APPENDIX 25a-63a – MEMORANDUM OPINION AND ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DIRECTING JUDGMENT OF DISMISSAL OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON ENTERED ON JUNE 9, 2004

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

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| LYNN STUTER, BYRD STUTER and MONICA STUTER, and as husband and wife,<br><br>Plaintiffs,<br><br>vs.<br><br>STEVENS COUNTY SHERIFF DEPARTMENT,<br><br>Defendant. | NO. CS-02-266-JLQ<br><br>MEMORANDUM OPINION AND ORDER **GRANTING** DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DIRECTING JUDGMENT OF DISMISSAL |

BEFORE THE COURT is Defendant's Motion for Summary Judgment (Ct. Rec. 104). This matter was heard by telephonic conference on March 30, 2004. Plaintiffs are represented by **Mary Schultz**. Defendant is represented by **Michael McFarland** and **Christopher Kerley**.

In this action filed in 2002, Plaintiffs claim that between 1992 and 1995 Lynn Stuter advocated educational reform to the Nine Mile Falls School Board. Plaintiffs allege that as a result of that advocacy students at Lakeview High School commenced an ongoing pattern of harassment of the Stuters through "car rallies" and the throwing of items at the Stuter residence. The Plaintiffs allege that the responses of the Sheriff's Department were inadequate and such inadequate responses encouraged further harassment by the students. Plaintiffs contend that the alleged inadequate responses establish that the Sheriff's Department was part of a conspiracy to violate the Plaintiff's First Amendment rights or to retaliate against them for their exercise of those rights

during the 1992-1995 time period.

The Plaintiffs filed this action on August 8, 2002, alleging that all "harassing" activities on or near their property were the result of Mrs. Stuter's 1992-1995 educational reform activity. Defendant Sheriff's Department seeks summary judgment and claims that Plaintiffs have not established a 42 U.S.C. § 1983 *prima facie* claim because there is no constitutional right to police protection. Plaintiffs contend that they have demonstrated numerous questions of fact which would allow for a finding that the Sheriff's Department's action, or inaction, led to a deprivation of Constitutional rights. Plaintiffs allege that a pattern of harassment by private actors coupled with an insufficient response by Defendant, Stevens County Sheriff's Department, led to the deprivation of their First Amendment rights. Defendant contends that the deputies responded frequently and adequately, and that regardless of the adequacy of the response, Plaintiffs have no Constitutional right to any certain level or standard of police protection.

SUMMARY JUDGMENT STANDARD OF REVIEW

It is important to note at the outset the procedural posture of this case. The matter before the court is a summary judgment motion, as opposed to a 12(b)(6) motion to dismiss. In resolving a 12(b)(6) motion, the court must: 1) construe the complaint in a light most favorable to the plaintiff; 2) accept all well-pleaded factual allegations as true; and 3) determine whether plaintiff can prove any set of facts to support a claim that would merit relief. *Cahill v Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996). No matter how improbable the facts alleged are, they must be accepted as true for purposes of motion to dismiss.

*Neitzke v Williams*, 490 U.S. 319, 327 (1989). A motion to dismiss for failure to state a claim is a disfavored remedy and is rarely granted. *Gilligan v Jamco Develop. Corp.*, 108 F.3d 246, 249 (9th Cir. 1997).

In contrast, summary judgment procedure is not regarded as a disfavored procedural shortcut, but rather is an integral part of the Federal Rules as a whole which are designed to secure the just, speedy and inexpensive determination of every action. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). When resolving a motion for summary judgment the court does not assume the truth of well-pleaded allegations in the complaint and the party opposing the summary judgment motion may not rest upon the mere allegations or denials of the pleadings, but must set forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e); *Brinson v. Linda Rose Joint Venture*, 53 F.3d 1044, 1049 (9th Cir. 1995); *Butler v. Cervantes*, __F.3d__(9th Cir. June 4, 2004)(District court is not required, or even allowed, to merely assume the truth of challenged factual allegations in the complaint). A party cannot create a "genuine" issue of "material" fact simply by making assertions in its legal memoranda. *S.A. Empresa De Viacao Aerea Rio Grandense v. Walter Kidde & Co.*, 690 F.2d 1235, 1238 (9th Cir. 1980). The opposing evidence must be significantly probative to permit a reasonable trier of fact to find in favor of the party opposing summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986). The test is whether the party opposing the summary judgment motion "has come forward with sufficiently 'specific' facts from which to draw reasonable inferences about other material facts that are necessary elements of the claim." *Triton Energy Corp. v. Square D Co.*, 68 F.3d 1216, 1221 (9th Cir. 1998). The opposing party must present competent, admissible evidence.

*Carmen v. San Francisco Unified School Dist.*, 237 F.3d 1026, 1028 (9th Cir. 2001). "A plaintiff's belief that a defendant acted from an unlawful motive, without evidence supporting that belief, is no more than speculation or unfounded accusation about whether the defendant really did act from an unlawful motive." *Id.* As will be discussed *infra*, Plaintiffs have not set forth admissible evidence supporting Plaintiffs' subjective belief about Defendant's motive. This court is only required to consider evidence set forth in the opposing party's papers and parts of the record specifically referred to therein. The court need not "comb the record" looking for other evidence. *Id.* at 1029-30.

## BACKGROUND

This court has previously ruled (Ct. Rec. 131) that with the filing of this action on August 8, 2002, only events occurring after August 8, 1999 are within the statutory three-year limitations period and are thus actionable. However, as this court previously ruled, since events occurring prior to that period may be admissible for background and to establish context and motive, this recitation of facts will include events occurring outside the three-year limitations period. The Stuters reported approximately 70 incidents or events to the Stevens County Sheriff's Department and the Stuters observed upwards of 100 incidents, some of which were unreported[1]. The court will not attempt to recount

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[1] The exact number of events is not clear from the record. Plaintiff's expert reviewed reports of 68 incidents. (Ct. Rec. 63). Defendant stated deputies responded to over 70 reports. (Ct. Rec. 135, ¶ 8). Plaintiff Lynn Stuter at times mentioned 100 or "one hundred and twenty of these things [memos she prepared of the events] or something like that". (Depo. p. 108). Further ambiguity results from the fact that some incidents were reported to the Sheriff's Department in anticipation

every event, however since Plaintiffs have consistently referred to a pattern of harassment, the court will set forth a significant portion of the events in detail. As this is Defendant's motion, the evidence and inferences arising therefrom are viewed in the light most favorable to the Plaintiffs. The following facts are undisputed, unless otherwise noted.

Plaintiff, Lynn Stuter, advocated education reform from 1992 to 1995. (Compl. p. 3; Depo. Lynn Stuter p. 24). She actively participated in school board meetings and wrote letters to school board members. (Compl. p. 3; Depo. Lynn Stuter p. 25). She was supported in these endeavors by Plaintiffs Byrd and Monica Stuter, respectively, her husband and daughter. (Compl. p. 3; Aff. Lynn Stuter Ct. Rec. 116). One of Lynn's reform ideas was that the school should limit funding of athletic activities in favor of emphasizing academics. (Compl. p. 4; Aff. Lynn Stuter Ct. Rec. 62).

Plaintiffs live in the relatively small community of Suncrest, and not all members of the school and community agreed with their educational views. In 1994 and 1995, Plaintiffs began to experience vandalism at their home in the form of eggs, pumpkins, and paintballs being thrown or shot towards their home. (Compl. p. 4; Aff. Lynn Stuter, Ct. Rec. 62). In 1995 the harassment "became an ongoing thing". (Depo. Lynn Stuter, p. 14). In 1995 Lynn Stuter ceased attending school board meetings and she stopped her local advocacy of educational issues in November of 1995. (Id. at

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of a response, some were not reported at all the Sheriff's Department but were rather recorded in Mrs. Stuter's memos, and some reports were faced by Plaintiffs to Defendant, but only for the purpose of notice, not because assistance was requested. (See Depo. Lynn Stuter at 221, 249, 272).

25 & 29). On October 27, 1995, a newspaper article appeared in the local paper that Lynn felt was "targeting" her for her educational views. (Id. at 30). It was that same night that the Stuter family first had problems with a car rally driving past the residence. (Id. at 30-31). Mrs. Stuter claims that there were 30 to 40 cars full of kids yelling obscenities. (Id. at 30). The newspaper article and the car rally that evening were the reasons Lynn Stuter stopped her local advocacy of educational issues in November of 1995. (Id).

Between November 2, 1995 and October 16, 1996, no major incidents of harassment or vandalism occurred which the Stuters felt warranted reporting to the Sheriff's Department[2]. (Depo. Lynn Stuter, p. 45). On October 16, 1996, the annual Homecoming car rally occurred in which eggs and tomatoes were thrown at the Stuter residence when the rally passed by. (Id. at 46). This car rally was reported by Mrs. Stuter to the Sheriff's Department and Deputies Erdman and Johnson responded. (Id. at 56). After that rally, in December of 1996, Lynn and Byrd Stuter wrote a letter to the Steven's County prosecutor's office in which they stated they had "no doubt" that the reason for the harassment was that the students were "incited by individuals from Lakeside High School and the Nine Mile Falls School Board and administration." (Id. at 69).

October of 1996 was the last time the Stuter residence was "egged." (Id. at 123). However, an incident occurred in February of 1997 in which the residence was hit with paint balls. (Id. at 79-80). This incident was reported and the Sheriff's Department responded that evening. (Id.). In July

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[2] All references herein to "the Sheriff's Department" or "Stevens County" are references to the Defendant Stevens County Sheriff's Department.

of 1997 some sort of explosive device or large firecracker was thrown on the Stuter's lawn which left a "divot in the front yard the size of a volleyball and about 4 inches deep." (Id. at 93). Deputy Waters responded to this incident and collected "debris from whatever this explosive device was." (Id.). The device landed approximately 20 feet in front of the home and did not damage the home or front porch. (Id.). Also in July of 1997, four McDonald's restaurant sauce containers were thrown onto the Stuter's yard. (Id. at 94). The Stuters called the Sheriff's Department, which responded, collected the sauce containers and attempted to obtain finger prints, but none were recovered. (Id. at 94-97; Depo. of Duane Gagnon at 52).

The next annual Homecoming car rally, the third year the rally passed in front of the Stuter residence, occurred September 24, 1997. (Depo. Lynn Stuter, p.108). A Sheriff's Department deputy was called, and when the deputy arrived he turned on his lights and possibly siren and participants in the car rally left the scene. (Id. at 113-115). After the 1997 car rally, Lynn Stuter wrote a letter to Captain Gagnon of the Stevens County Sheriff's Department in which she stated, "had it not been for the deputies in the area we have no doubt that serious damage would have been done to our property... Please extend to your deputies our thanks for their help." (Id. at 120).

The Stuter residence was "paint balled" again on October 4, 1997, and that was the last occasion this occurred. (Id. at 121 & 123). The 1998 Homecoming car rally occurred on September 30, 1998. (Id. at 141). The cars in the rally made several passes by the Stuter residence and then were diverted away from the residence by the Sheriff's Department. (Id. at 142). The Sheriff's Department had multiple patrol cars

present during the rally, a deputy stood in the Stuter driveway, and there was a Washington State Patrol car that drove by during the rally. (Id. at 145). After the rally, Lynn Stuter thanked two Sheriff's Department deputies who were in her driveway and she told an individual in the prosecutor's office that she appreciated the efforts of the Sheriff's Department during the 1998 rally. (Id. at 150-151).

In October through December of 1998 there were periodic incidents of individuals driving by the Stuter residence and honking.[3] A broken beer bottle was found in the Stuter driveway. On August 8, 1999,[4] Mrs. Stuter reported an allegedly "explosive device," M-70 firecracker, was found between the road and the Stuter's driveway. (Id. at 172; Depo. John Bowers at 15). Deputy Bowers responded and wrote a report indicating the device was not on the Stuter's property, but was on the county easement between the Stuter's property line and the paved portions of the roadway. (Depo. John Bowers, p. 15). On September 22, 1999, another explosive device/firecracker was found on the Stuter's property. (Depo. Lynn Stuter, p. 176). A deputy responded and collected the item. (Id.).

On September 29, 1999, the annual Homecoming car

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[3] Whether an incident was reported and the nature of Defendant's response was not always discussed for each incident described in Mrs. Stuter's deposition. However, Mrs. Stuter stated that she could not recall an incident prior to September of 1997 in which Defendant did not respond, and that there were some occasions after that date when an officer did not respond, but she could not recall a specific incident in which there was not a response. (See Depo. Lynn Stuter at 107-108).

[4] This event on August 8, 1999, is the first event that occurred within the three year statute of limitations period because the complaint was filed on August 8, 2002.

rally occurred. That evening the car rally made several passes by the Stuter residence. Mrs. Stuter parked a vehicle in the road which blocked the road to oncoming traffic. (Id. at 187). Mrs. Stuter was also armed with a shotgun. (Depo. John Bowers, p. 42). As the deputies approached, Mrs. Stuter was told to put down the shotgun and complied. (Id. at 46). A verbal confrontation ensued between Mrs. Stuter and Deputy Bowers, with Mrs. Stuter using vulgar language. (Id. at 47). After a few minutes, Mrs. Stuter removed her truck that was blocking the roadway and cleared the area. Deputy Bowers did not issue a citation the night of the incident, but in his report he requested that charges be reviewed by the prosecutors. (Id. at 67-68). Mrs. Stuter was not arrested that evening, nor was she restrained by handcuffs or temporarily taken into custody. Charges were subsequently brought by the county prosecutor against Mrs. Stuter and she was convicted of disorderly conduct. The conviction was affirmed on appeal. (Ct. Rec. 49 & 61).

On December 16, 1999, a juvenile, David Noble, drove by the Stuter residence and honked excessively. (Depo. Lynn Stuter, p. 195). A deputy from Stevens County responded, contacted David Noble, and referred his report to the prosecutor for charges. (Id. at 196). The prosecutor subsequently filed charges against David Noble. (Id.).

On March 12, 2000, a car drove by the Stuter residence and honked. This event was reported by Mrs. Stuter to Deputy Bowers on March 14, 2000. (Id. at 200-01). In April 2000, there was another car that drove by and honked and an incident where two beer cans were found in the driveway. (Id. at 203). Also in late-April 2000, a car drove by honking and the drive yelled something indiscernible. (Id. at 206). This was reported to the Sheriff's Department

by the Plaintiffs and a deputy responded. (Id.). On May 16, 2000, an individual drove by and "moo-ed" at Monica Stuter. (Id. at 207). The Sheriff's Department was called by Mrs. Stuter and eighteen minutes later a deputy responded to the Stuter residence. (Id. at 208).

On June 13, 2000, some videotape was strung on the Stuter's front fence. (Id. at 208-09). A deputy was called by Mrs. Stuter, and the deputy responded and collected the videotape. (Id. at 210). Mrs. Stuter's next report to the Sheriff's Department, of June 27, 2000, was of several vehicles driving by her home. The occupants of these vehicles did not honk or yell, but Mrs. Stuter considered their behavior "suspicious." (Id. at 214). On Halloween, October 31, 2000, a vehicle drove by and honked. The honking was reported by Plaintiffs, and a deputy responded via telephone. (Id. at 215).

The next incident Mrs. Stuter documented[5] occurred on February 18, 2001, when she found a beer bottle in her driveway and called the Sheriff's Department. (Id. at 215-16). A deputy responded to this report of a beer bottle and collected the bottle. (Id. at 219). On March 23, 2001, a vehicle drove by and an occupant allegedly yelled, "hey, woo, woo, woo." (Id. at 220).

The next event that occurred at the Stuter residence was a vehicle driving by and honking on October 5, 2001. (Id. at 223). October 5, 2001 was the night of the annual Homecoming car rally that year. (Id. at 224). Deputies

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[5] Other unreported incidents may have occurred during the statutory period, but these unreported events are not relevant to an evaluation of Defendant's response or to a determination of deliberate indifference.

Westerman and Bowers were at the Stuter residence that evening and Deputy Bowers wrote several tickets for traffic violations. (Id.; Depo. John Bowers p. 171). Ten vehicles were ticketed; most of the violations were for illegal U-turns, but also included driving without license or insurance and the fines ranged from $86 to $576. (Officer report of John Bowers, case #01-11213). On November 14, 2001, a vehicle drove by the Stuter residence and honked. The incident was reported by Michelle Stuter to the Sheriff's Department which responded to the scene in seven minutes. (Depo. Lynn Stuter, p. 238-39). When the responding deputy left the Stuter residence, he did not latch the gate properly and Mrs. Stuter called to report this to the Sheriff's Department. (Id. at 242).

On January 5, 2002, a vehicle stopped in the street and a teenager was seen getting the passenger side of the car at 1:45 a.m. (Id. at 246-48). No honking, yelling, or throwing of items was reported in this event, but the Stuters reported it to the Sheriff's Department as "suspicious activity." (Id.). On April 15, 2002, a vehicle drove by and honked. (Id.). The incident was reported to the Sheriff's Department although the Stuters had no description of the vehicle. (Id. at 249). On April 23, 2002, two vehicles stopped outside the Stuter residence just before 9:00 p.m. (Id. at 250). When the Stuters opened the front door to their residence, the vehicles drove away, and Mrs. Stuter is not aware of the occupants of the vehicles directing any conduct towards the Stuter family. (Id. at 250-51). A report of this event was faxed to the Sheriff's Department. (Id.).

In May 2002, a 4-inch diameter driveway reflector was thrown onto the Stuters' driveway. (Id. at 252-53). In July 2002, a vehicle drove by and an occupant yelled, "F___

you." (Id. at 254). On August 14, 2002, in the middle of the afternoon, three boys rode by on bicycles, stated the Stuters' dog looked cute, and then "started chanting "Stuter, Stuter, Stuter." Mrs. Stuter faxed a report of this incident and two deputies responded. (Id. at 256). When the deputies arrived, Mrs. Stuter asked them to leave and come back later because her husband was in the shower. (Id.). When the deputies returned, they talked to the Stuters and one of the deputies asked if the Stuters would like "stepped up patrols." (Id. at 262). Byrd Stuter turned down the offer for stepped-up patrols. (Id.).

The 2002 annual Homecoming car rally occurred in mid-October but did not come by in front of the Stuter residence. (Id. at 264). However, one individual did drive by squealing his tires and honking. (Id. at 265). The next reported incident involved a car driving by and honking on February 23, 2003, and a report was faxed to the Sheriff's Department by Mrs. Stuter. (Id. at 267). A similar event occurred on March 8, 2003, and a report was faxed to the Sheriff's Department by Mrs. Stuter. (Id. at 268-69). Two days after Mrs. Stuter faxed her report about the honking on March 8, 2003, a deputy stopped by the Stuter residence. (Id.). Mrs. Stuter was home, but didn't open her door because she "didn't see any necessity in letting him know that [she] was home". (Id. at 270). Mrs. Stuter felt the deputy coming to her property was "suspicious", even though she had recently faxed in two reports because she "had not requested officer presence on [her] property". (Id. at 272). Mrs. Stuter filed a citizen's complaint against this deputy for coming on her property. (Id.).

On April 12, 2003, the Stuters' mailbox was damaged by an unknown individual. (Id. at 273). On May 7, 2003, a

vehicle drove by the Stuter residence and honked. (Id. 275). Mrs. Stuter did not have a description of the vehicle or license plate number, but she faxed a report to the Sheriff's Department. (Id.). On July 25, 2003, a Dots candy box was found in the Stuters mailbox and reported by Mrs. Stuter. (Id. at 276). The Sheriff's Department responded, collected the box, and attempted to obtain fingerprints, but none were obtained. (Id. at 277). Mrs. Stuter found it "oddly suspicious" that no fingerprints were found. (Id. at 278).

On July 27, 2003, a juvenile male leaned out his car window as it drove by and yelled something unintelligible to Mrs. Stuter as she was working in her front yard. (Id.). On August 23, 2003, a car drove by the Stuter residence several times with three juvenile males. (Id. at 279-80). There was no reported honking or yelling, but Mrs. Stuter found the car's actions to be "suspicious." (Id. at 280). This was the last reported incident that was detailed in the summary judgment record. However, Mrs. Stuter did state that "probably six" incidents had occurred of similar nature including "suspicious activity, honking horns, glass bottles thrown in driveway" that were unreported incidents, i.e., not reported by her to the Sheriff's Department, that occurred between August 2003 and March 2004. (Id. at 281).

## SUMMARY JUDGMENT

The purpose of summary judgment is to avoid unnecessary trials when there is no dispute as the material facts before the court. *Northwest Motorcycle Ass'n v. U.S. Dept. of Agriculture*, 18 F.3d 1468, 1471 (9th Cir. 1994). The moving party is entitled to summary judgment when, viewing the evidence and the inferences arising therefrom in the light most favorable to the nonmoving party, there are no

genuine issues of material fact in dispute. Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). While the moving party does not have to disprove matters on which the opponent will bear the burden of proof at trial, they nonetheless bear the burden of producing evidence that negates an essential element of the opposing party's claim and the ultimate burden of persuading the court that no genuine issue of material facts exists. *Nissan Fire & Marine Ins. Co. v. Fritz Companies*, 210 F.3d 1099, 1102 (9th Cir. 2000). When the nonmoving party has the burden of proof at trial, the moving party need only point out that there is an absence of evidence to support the nonmoving party's case. *Devereaux v. Abbey*, 263 F.3d 1070, 1076 (9th Cir. 2001).

Once the moving party has carried its burden, the opponent must do more than simply show there is some metaphysical doubt as to the material facts. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Rather, the opposing party must come forward with specific facts showing that there is a genuine issue for trial. *Id.*

Although a summary judgment motion is to be granted with caution, it is not a disfavored remedy: "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action." *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986)(citations and quotations omitted).

## DISCUSSION

Defendant makes essentially four arguments addressing

why Plaintiffs have failed to establish a § 1983 violation against the Sheriff's Department: 1) the alleged violation of First Amendment rights was not committed by persons acting under color of law; 2) the alleged failure by Stevens County Sheriff's Department to protect Plaintiffs from private criminal conduct by others is not a Constitutional violation; 3) Plaintiffs have failed to establish a Due Process or Equal Protection violation; and 4) Plaintiffs have failed to establish a policy or custom on the part of Stevens County. The court will address these contentions in the order presented.

**I. Action under color of law**

Section 1983 provides in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State...subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. 42 U.S.C. § 1983.

Defendant argues the harassment in the form of vandalism and car rallies was committed by private actors, the students, and was not action taken under color of law by the Sheriff's Department. Plaintiff contends that Stevens County was a substantial actor in the deprivation of the Stuters' First Amendment rights and that questions of fact exist as to whether Stevens County played a part in the creation of the harassment or rendered the Stuters more vulnerable to the harassment.

"Whether the actual individual who inflicted the injuries acted under color of state law is often a threshold question." *Van Ort v. Estate of Stanewich*, 92 F.3d 831, 835 (9th Cir. 1996). Individuals do not have a constitutional right to be free from the infliction of harm by private actors. *Id.* Action under color of law by the named Defendant is a jurisdictional requisite for a § 1983 action. *Gritchen v. Collier*, 254 F.3d 807, 812 (9th Cir. 2001).

The Stevens County Sheriff's Department, when it acts, clearly acts under the color of law. The analysis in this case is not as simple because Plaintiffs contend that the Sheriff's Department's alleged "failure to act", was the action under color of law. Plaintiffs argue that the alleged failure to enforce the laws supported private acts of censorship, played a part in their creation, and rendered the Stuter family more vulnerable to the harassment by the students. (Ct. Rec. 126, p. 26). Plaintiffs argue that, "a state actor may be subject to liability for an action physically undertaken by private actors in violation of the plaintiff's liberty or property rights if the state actor directed or aided and abetted the violation." *Dwares v. City of New York*, 985 F.2d 94, 98 (2nd Cir. 1993). The *Dwares* court discussed the Supreme Court's holding in *DeShaney v. Winnebago County Dept. of Soc. Servs.*, 489 U.S. 189 (1989) that the Due Process Clause does not create a duty on the part of the State to protect the life, liberty and property of its citizens against invasion by private actors. The Second Circuit in *Dwares* stated, "We read the *DeShaney* Court's analysis to imply that, though an allegation simply that police officers had failed to act upon reports of past violence would not implicate the victim's rights under the Due Process Clause, an allegation that the officers in some way had assisted in creating or increasing the danger to the victim would indeed implicate those

rights." 985 F.2d at 99.

Plaintiffs ask that this court now find a genuine issue of material fact as to whether Stevens County played a role in the creation of the acts of harassment or left the Stuters more vulnerable to the harassment. Based upon the undisputed facts in the record, there is no evidence that the Stevens County Sheriff's Department played a role in creating the harassment. Plaintiffs themselves believe the harassment was in retaliation for Plaintiff's educational advocacy and incited by someone in the education realm (students, parents, school board, principal – were all mentioned as possible instigators). (Depo, Lynn Stuter, p. 68-9, 152-54, 292). The first major event of harassment was the October 1995 annual Homecoming car rally, which Plaintiffs believe was potentially incited by an article written in a local newspaper by a parent of a high school student. (Affidavit Lynn Stuter, Ct. Rec. 116). Lynn Stuter stated the reason she ceased her local advocacy in November of 1995 was the 1995 car rally (the first to target her house) and the newspaper article. (Depo. Lynn Stuter, p. 30). Plaintiffs contend that some of the later acts of harassment were "created" by Stevens County's ineffective response. However, that argument is foreclosed by *DeShaney* and *Demaria v. Washington County*, 12 F.Supp.2d 1093 (D. Idaho 1996) *aff'd* 129 F.3d 125 (9th Cir. 1997).

In *DeShaney*, 489 U.S. 189, a father beat his four-year old son into a coma, causing severe brain damage. The mother brought suit alleging that her son had been deprived of his liberty without due process of law in violation of the Fourteenth Amendment because the State failed to protect her son from a known risk of violence. The state had known of the abuse by the father for two years before the near

deadly beating occurred. The county had even taken temporary custody of the child for a three-day period when a prior beating occurred, convened an ad hoc child protection team, and the department of social services was making monthly visits to the child's home. The Supreme Court stated:

> While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them. That the State once took temporary custody of Joshua does not alter the analysis for when it returned him to his father's custody, it placed him in no worse position than that in which he would have been had it not acted at all; the State does not become the permanent guarantor of an individual's safety by having once offered him shelter. Under these circumstances, the State had no constitutional duty to protect Joshua.

*DeShaney*, 489 U.S. at 201. The court later stated, "The most that can be said of these state functionaries in this case is that they stood by and did nothing when suspicious circumstances dictated a more active role for them." *Id.* at 203.

The central tenet of Plaintiff's argument in this case, which was reiterated at the summary judgment hearing, is that the Stevens County Sheriff's Department's response to the events at the Stuter residence was insufficient. In fact, Plaintiffs at times have characterized the Sheriff's Department's response more severely than merely calling it insufficient. The Complaint uses the following characterizations: "failed to investigate"; "no action was taken"; "due to inaction"; "complete failure of police

protection"; "ineptness"; "No action was taken by the Stevens County Sheriff's Department on any of these incidents"; "due to the lack of police protection". (Ct. Rec. 1). The Complaint also contained language more akin to the insufficient response argument made at the summary judgment hearing: "department refused to provide material assistance, protection or resolution." (Ct. Rec. 1).

Plaintiffs contended at oral argument that a jury should be allowed to find the Sheriff's Department response was insufficient. Plaintiffs wish to extrapolate this alleged insufficient response into affirmative action by claiming that taking no action emboldened the students or implicitly gave permission for the harassment to continue. The record clearly establishes beyond any possible dispute that the Sheriff's Department invested a great deal of time and resources in responding to approximately 70 reports from the Stuter residence and deployed extra deputies on the nights of the annual Homecoming car rallies. (Ct. Rec. 135, ¶ 8). The factual background section, *supra*, demonstrates that deputies responded numerous times to relatively minor incidents such as a vehicle driving by and honking. It also shows that the deputies collected evidence, wrote traffic violations for vehicles in the car rally, and referred at least one individual for prosecution. The record clearly demonstrates that allegations in the Complaint such as, "No action was taken by the Stevens County Sheriff's Department on any of these incidents" were contrary to the undisputed facts. (Ct. Rec. 1)[6]. For example, at the 1998 car

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[6] The undisputed facts clearly demonstrate that it is not the case that deputies commonly failed to respond to the Stuter's [sic] reports. At her deposition, Mrs. Stuter could recall no specific incident in which there was not a response by the Sheriff's Department:

Q: [by Mr. McFarland]: Was there ever an occasion up until September 7th of '97 when no one came at all in response to one of your reports?

A: Not that I recall.

Q: All right The -- next?

A: Wait a minute. No, no, I could be wrong there. There was an incident -- now, this could be before or after that -- there was an incident, and when we called in, the deputy called us and asked us if we had gotten a license plate number and we said, No, and he said, Well, I am not responding from Loon Lake, then. Now, whether that was before or after this [September 7, 1997], I don't recall. (Depo, transcript at 107).

Mr. McFarland followed up on this point:

Q: Can you think of another occasion where you made a report and there was no response whatsoever from the sheriff's office or no contact made whatsoever from the sheriff's office?

A: Contact where they actually came to the house?

Q: Or by phone.

A: Okay. No, not that I recall prior to that time unless that incident was prior to that time.

Q: Let me expand it a little bit, and we will go through these so if we come across one that makes you remember it, you can always tell me. But as you sit here right now can you think of an occasion other than what we just talked about with an officer at Loon Lake where you made a report requesting officer contact and you didn't get officer contact at any point in time?

A: There were some after this, yes.

Q: Can you think of them without running through your memos?

rally, extra officers were present, including at least one Washington State Patrol car, and Mrs. Stuter conveyed her thanks to the officers for their efforts. Mrs. Stuter had conversations with Captain Gagnon and Captain George. Captain Gagnon told deputies to make additional patrols in Suncrest if they had time , respond to calls from the Stuters, and to make written reports. (Depo. Duane Gagnon, p. 32-34, 41). Deputies at least three times picked up trash that Mrs. Stuter surmised was left on her property by juveniles and attempted to obtain fingerprints. These are just a few examples of the affirmative efforts of the Stevens County Sheriff's Department.

However, it is clear that Plaintiffs wanted more to be done. In Mrs. Stuter's 1997 letter to Captain Gagnon she thanked the Department for its help and presence during the 1997 car rally, but concluded the letter with: "We want the juveniles involved prosecuted." Regardless of the fact that the Stuters wanted more done, this does not impact the conclusion that the Sheriff's Department played no role in the creation of the harassment. Under *DeShaney*, Plaintiffs' assertion that the Sheriff's Department created the harassment is untenable for three reasons: 1) the harassment clearly existed before the Defendant Sheriff's Department became involved in this matter at the Stuters' request, and in fact, that request was the cause of the Sheriff's Department becoming involved; 2) Plaintiffs believe the harassment was initially created by individuals in the educational realm and by an unfavorable newspaper article about Lynn Stuter; and 3) even if the Sheriff's Department had "created" the harassment, which the undisputed facts fail to establish, the

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A: No. Like I said, there is one hundred and twenty of these things or something like that, so far as going back and being able to call that up like a computer might be able to, no. (Depo. transcript at 107-08).

harassment began in 1995, which is outside the statute of limitations.

As to Plaintiffs' other assertion that the Defendant's actions can be viewed as making the Stuters more vulnerable, the *DeShaney* court rejected that approach even though the state had intervened numerous times and then left the child alone again with his father. The *DeShaney* court found the child was left in no worse a position than had the state not intervened at all. Similarly, here the Sheriff's Department responded innumerable times to the Plaintiffs' approximately 70 reports and Plaintiffs acknowledged the protection that was given during the 1997 and 1998 car rallies. The Sheriff's Department could not, of course, stand guard at the Stuter residence twenty four hours a day, and as the *DeShaney* court noted: "the State does not become the permanent guarantor of an individual's safety by having once offered him shelter" 489 U.S. at 201.

Plaintiffs, in arguing that the Stuters were made more vulnerable, or possibly left in a worse position, due to Defendant's alleged insufficient intervention, have misstated the factual record. Plaintiffs have continually referred to Mrs. Stuter's **arrest** on the night of September 29, 1999 when she blocked the road with her vehicle and stood by with a shotgun. Plaintiffs have referred to the "arrest" as an act carried out in front of her harassers that was a "statement of solidarity" made by law enforcement in support of harassers. (Ct. Rec. 152, p. 6-7). The undisputed facts establish that Mrs. Stuter was not arrested or even issued a citation on the evening in question. At the hearing on Defendant's first summary judgment motion on January 14, 2004, the court made Plaintiffs' counsel aware of this inaccurate characterization. Plaintiffs' counsel admitted it

was a mischaracterization and that Mrs. Stuter was not arrested. Despite this, her "arrest" has been referred to in several of Plaintiff's pleadings since that acknowledgment. The court assumes that this is negligent drafting, although it could be viewed by others as an attempt to mislead the court in light of the court having previously pointed out the Plaintiffs' counsel that Mrs. Stuter was never arrested and Plaintiffs' counsel acknowledging that fact at the hearing on the prior summary judgment motion. Regardless, it is undisputed that Lynn Stuter was not arrested. Plaintiffs' provided this court with a videotape of the incident, which Lynn Stuter has stated shows the entirety of the events that evening, with the exception of the first thirty seconds of Deputy Bower's arrival on the scene. (Depo. Lynn Stuter p. 192-93). The video does not show Lynn Stuter being arrested or in any manner taken into custody. Deputy Bowers did not even cite Lynn Stuter on September 29, 1999, but instead filed a report with the prosecutor's office that recommended charges be reviewed. (Depo. Jonathan Bowers, p. 67-69).

The court is required to make all reasonable inferences from the evidence in favor of the non-moving party (Plaintiffs), however, this does not entitle Plaintiffs to misstate the evidence in the record to the court. A party does not create a genuine issue of material fact simply by making assertions in its legal memoranda. *S.A. Empresa De Viacao Aerea Rio Grndense v. Walter Kidde & Co.*, 690 F.2d 1235, 1238 (9th Cir. 1980). In reviewing Plaintiffs' responsive statement of undisputed facts (Ct. Rec. 115), the court noticed several misstatements. Plaintiffs state, "It was believed that the reason for this harassment was the Stuters' advocacy," and cite to portions of the deposition of Captain Duane Gagnon. (Ct. Rec. 115, ¶ 6). Plaintiffs also relied on

Gagnon's deposition at oral argument for the proposition that the Sheriff's Department was aware the Stuters were being harassed because of their views. The actual deposition testimony cited only states that Mrs. Stuter had told Gagnon that she was having problems with the school board or school personnel, something to do with Mrs. Stuter's daughter, and she felt the students were being instructed to harass her. When asked "By the school board?"; Gagnon responded, "No, she never—I don't remember her becoming clear on that. She just felt that there was someone that was instigating this, but she never told me who or any names that I can remember." (Depo. Gagnon, p. 35). This testimony does not support Plaintiffs' contention that Captain Gagnon of the Sheriff's Department understood the Stuters were being harassed for their educational advocacy. Rather, the reasonable inference is that Captain Gagnon knew the Stuters were having some problems with school board members or personnel.

Plaintiffs' statement of undisputed fact, based on Captain Gagnon's deposition, that "The state understood this harassment" (Ct. Rec. 115, ¶ 11) is even more misleading. The deposition testimony cited to support this statement reads, "This report to me does show that there was some evidence there, and I couldn't tell you why the prosecutor's office wouldn't issue at least a malicious mischief or harassment on it, to be honest with you." (Depo. Gagnon, p. 57). The only reasonable inference is that Captain Gagnon thought that there was some evidence of malicious mischief or harassment, not that Defendant understood the basis for the harassment was the Stuters' advocacy.

Paragraphs 13-18 of Plaintiff's responsive statement of facts describe various acts of the students that allegedly

constituted harassment. Paragraph 19 then states, "Deputies stood by while this occurred" and cites three pages of the deposition testimony of Chris Perkins. The first page cited says nothing about the deputies or their actions. The second page cited directly contradicts Plaintiffs [sic] statement that the deputies did nothing:

Q: [Plaintiffs' counsel] Do you recall, sir, there being at least one of the rallies where there was a deputy, at least one deputy that was kind of parked over in a driveway right in front of Stuters' house?

A: Generally there was always about four or five.

Q: Out in front of Stuters' home?

A: Yes,

Q: When you guys would drive by then and circle around and scream profanities at the Stuters', did any of the deputies ever come out and tell you to knock if off?

A: Yes. They would get in, pull over cars, they would break up the car rally. They would try to disperse --

Q: When did that happen where they came in and broke up the rally?

A: That was generally every year.

(Depo. Perkins, p. 59). The third citation by Plaintiffs does indicate that cars would circle back and forth in front of the Stuters' residence, honking, with people yelling obscenities and that such activities occurred in front of deputies.

However, on the very next page, Mr. Perkins stated that he believed people were ticketed for such behavior. (*Id.* at 65).

This court will not spend time pointing out every inaccuracy or misstatement it has observed, but one more requires mention – paragraph 107 of Plaintiffs' responsive statement of fact reads, in part, "Since the local authorities would not deter and in fact encouraged the harassment towards her, she quit her local activism." (Ct Rec. 115). In support of this statement, Plaintiffs cite to the affidavit of Lynn Stuter filed concurrently. (Ct. Rec. 116). The court has read the affidavit and it does not state that the deputies encouraged harassment or that Mrs. Stuter felt or believed the deputies encouraged harassment. Rather it states that Mrs. Stuter informed some individuals at the Sheriff's Department of her belief that she was being harassed due to her educational concerns and that, "Nothing of substance was ever done." (Affidavit Lynn Stuter ¶ 8). This indicates Mrs. Stuter felt Defendant's response was passive and insufficient, it is not evidence of any kind in support of the proposition that the Sheriff's Department affirmatively encouraged or otherwise aided and abetted the students.

Despite Plaintiffs' failure to come forward with significantly probative specific facts to support the above statements, this court could assume *arguendo* that the Sheriff's Department did know that some of the student harassers disagreed with the Stuters' educational views and advocacy. The court will also assume *arguendo* that on some occasions, some students drove down the public street in front the Stuter residence and honked or yelled in the presence of law enforcement, and that those students were not arrested or cited for such conduct. Neither the Sheriff's Department knowledge of the student's [sic] motivation for

the harassment or the fact that the Sheriff's Department exercises discretion in performing law enforcement duties impacts the ultimate conclusion in this case.

In response to Plaintiffs' argument that the Sheriff's Department's alleged insufficient responses made Plaintiffs more vulnerable, Defendant directs the court to *Demaria v. Washington County*, 12 F.Supp.2d 1093 (D. Idaho 1996) *aff'd* 129 F.3d 125 (9th Cir. 1997). In *Demaria* the plaintiffs sued the county and an individually named sheriff and deputy for the failure to protect from harassers, failure to train, etc. The plaintiffs in *Demaria* made an argument strikingly similar to that made by the Stuters and alleged that the failure to arrest the harassers had emboldened the harassers to continue the harassment, thus affirmatively placing them in danger. The court rejected the argument and made two interesting statements about an officer who fails to act: 1) "an officer like Sheriff Wadley or Deputy Nelson who fails to enforce the law is just like no officer at all, and the Due Process Clause is not implicated."; and 2) "In every case where an office stands by and does nothing, a claim could be raised that the officer's inaction emboldened the criminal. But *DeShaney* has clearly foreclosed these claims." *Id.* at 1099-1100. Thus, *Demaria* explains that if Plaintiffs contend the Sheriff's Department did nothing, then there is no action under color of law and the Due Process Clause is not implicated. If Plaintiffs contend that the deputies emboldened the criminals by not doing enough, that argument is foreclosed by *DeShaney*.

Thus, it is clear as a matter of law that Defendant's actions did not create the harassment, which started in 1995, the year Mrs. Stuter ceased her advocacy, (also four years prior to the statute of limitations period and seven years prior

to the commencement of this action) and which Plaintiffs believe was motivated by a newspaper article and/or individuals associated with the educational realm. It is also clear as a matter of law that Plaintiffs' argument that Defendant's insufficient response made them more vulnerable is foreclosed by *DeShaney* and *DeMaria [sic]*.

**II. Failure to Protect as a Constitutional Violation**

As discussed in this court's previous summary judgment ruling addressing the statute of limitations (Ct. Rec. 131), this case does not rest solely on a claim that Constitutional rights were infringed by a failure to enforce the law against the harassers or to protect the Stuters. Rather Plaintiffs have based their claim on the First Amendment. Plaintiffs concede that a failure to enforce on any individual occasion is not actionable. (Ct. Rec. 125, p. 42). Plaintiffs do argue, however, that a pattern of insufficient response equaled state suppression of free speech and was the moving force behind the constitutional violation.

The Due Process Clause does not require the state to protect the life, liberty, and property of its citizens from private actors. *DeShaney v. Winnebago City Soc. Servs. Dept.*, 489 U.S. 189, 195 (1989). A plaintiff does not have a Due Process right to a full and fair police investigation. See *Gomez v. Whitney*, 757 F.2d 1005 (9th Cir. 1985) ("we can find no instance where courts have recognized inadequate investigations as sufficient to state a civil rights claim unless there was another recognized constitutional right involved"). Here, there is another Constitutional right involved as Plaintiffs allege a First Amendment violation. In *Escamilla v. City of Santa Ana,* 796 F.2D 266 (9th Cir. 1986), the Ninth Circuit rejected a § 1983 complaint that was essentially a

failure to protect claim framed as deprivation of life without due process of law. The court noted the guiding principle that, "government officials generally are not liable under Section 1983 for their failure to protect citizens from dangerous situations which state officials neither created nor exacerbated." *Id.* at 270. However, the court also stated that, "a section 1983 action may be maintained when the plaintiff alleges violation of a specific substantive constitutional guarantee other than due process." *Id.* at 268. A local government entity may be liable if it has a policy of inaction and such inaction amounts to a failure to protect constitutional rights. *Lee v. City of Los Angeles*, 250 F.3d 668, 681 (9th Cir. 2001). However, the custom or policy of inaction must be the result of a conscious or deliberate choice to follow a course of action that is made from among various alternatives by the official or officials with final policy-making authority. *Id.* (citations and quotations omitted).

As discussed *infra*, Plaintiffs have failed to establish an official policy, municipal custom, or deliberate indifference on the part of Defendant that was the moving force behind a Constitutional deprivation.

**III. Due Process and Equal Protection**

Defendant, in the third portion of its summary judgment memo, deploys several other arguments as to why Plaintiffs cannot, and have not, established a § 1983 claim. Defendant contends that in addition to not establishing a First Amendment violation, Plaintiffs have not established a Due Process or Equal Protection violation, or established the requisite municipal policy or custom.

**A. Due Process**

As set forth *supra*, Plaintiffs cannot establish a Due Process violation based on inadequate police protection or failure to adequately respond or investigate. See *DeShaney*, and *Gomez*. However, the inability to bring a Fourteenth Amendment Due Process claim, does not foreclose a § 1983 claim based on the alleged deprivation of First Amendment rights.

**B. Equal Protection**

Plaintiffs, at the hearing on Defendant's first summary judgment motion, stated that they were not asserting an Equal Protection violation. As set forth in the court's previous memorandum opinion, (Ct. Rec. 131), in order to establish a § 1983 equal protection violation, Plaintiffs must show that the defendants, acting under color of state law, discriminated against them as members of an identifiable class and that the discrimination was intentional. *Flores v. Morgan Hill Unified School Dist.*, 324 F.3d 1130, 1134 (9th Cir. 2003). Plaintiffs must show that they were intentionally discriminated against by reason of their membership in a protected class. Plaintiffs have not alleged that they were discriminated against on the basis of a protected class, or treated differently than similarly situated individuals, but rather claim that police failure to respond in an adequate manner was due to their First Amendment right to advocate education reform.

The court is concerned that this Equal Protection issue, that was argued by both parties in the briefing for the first summary judgment motion, is now being argued again by both parties, despite Plaintiffs' concession at the first hearing

that this case presented "purely" a First Amendment claim. Plaintiffs' counsel stated to the court at the first summary judgment hearing that Plaintiffs were making no claim based on Equal protection or selective enforcement. However, despite that concession, Defendant has continued to argue for dismissal of this Equal Protection claim, and Plaintiffs have continued to respond--most recently informing the court, after three pages spent defending the claim, that "although an equal protection claim is viable, it may not be necessary as the claim is not larger than the Plaintiffs' First Amendment claim." (Ct. Rec. 125, p. 47). Because Plaintiffs have previously disavowed that they were asserting any Equal Protection claim and because there are not sufficient allegations in the complaint nor evidence in the record to support an Equal Protection claim, the court will enter a formal ruling. Defendant's motion for summary judgment as to the Equal Protection claim is **GRANTED**. Plaintiffs are precluded from asserting a § 1983 claim based on the Equal Protection Clause.

**IV. Municipal Policy or Custom**

The Supreme Court set forth the standard for municipal liability in *Monell v. Department of Social Services*, 436 U.S. 658 (1978). In *Monell* the Supreme Court rejected the idea of *respondeat superior* liability under § 1983. Instead, the Court required that the claim be based upon the implementation or execution of a "policy statement, ordinance, regulation, or decision officially adopted and promulgated" or based upon governmental custom, "even though such a custom has not received formal approval through the body's official decision-making channels. *Id.* at 690-91. "A § 1983 action against a city fails as a matter of law unless a city employee's conduct violates one of the

plaintiff's federal rights." *Orin v. Barclay*, 272 F.3d 1207, 1217 (9th Cir. 2001). Defendant alleges that Plaintiffs cannot establish a policy or custom, or demonstrate a deliberate or conscious choice by Defendant that caused a constitutional deprivation.

Plaintiffs rely on Ninth Circuit precedent which states, "a plaintiff may prove the existence of a custom or informal policy with evidence of repeated constitutional violations for which the errant municipal officers were not discharged or reprimanded." *Navarro v. Block*, 72 F.3d 712, 714 (9th Cir. 1995)(internal citations and quotations omitted). The Navarro standard requires "evidence of repeated constitutional violations" which would require Plaintiffs to demonstrate that inaction by Defendant (state action) *caused* the alleged First Amendment deprivation--a showing which has not been made. Plaintiffs also contend that a local government or entity may be liable if it has a policy of inaction, and if such inaction amounts to a failure to protect constitutional rights. *Lee v. City of Los Angeles*, 250 F.3d 668, 681 (9th Cir. 2001). However, this is only true if the policy of inaction is the result of a deliberate or conscious choice. *Id.* This policy or custom must inflict the injury for the municipality to be liable; there must be a "direct causal link" between the policy and the alleged constitutional deprivation. *Canton v. Harris*, 489 U.S. 378, 385 (1988). Stated differently, the policy or custom must be "the moving force" behind the alleged constitutional violation. *Monell*, 436 U.S. at 694.

At oral argument, Plaintiffs relied particularly on *Dwares v. City of New York*, 985 F. 2d at 94 (2nd Cir. 1992) and *Lee v. City of Los Angeles*, 250 F.3d 668 (9th Cir. 2001). First, these two cases are procedurally distinct because they

involve Fed. R. Civ. P. 12(b)(6) motions to dismiss that were granted by the district court. The Circuit court reversed in both cases finding the allegations sufficient to defeat a motion to dismiss[7]. However, the case *sub judice* is at the summary judgment stage and the parties have engaged in months of extensive discovery. Plaintiffs may not defeat a summary judgment by relying on mere allegations, but rather must come forward with admissible evidence that creates a genuine issue as to a material fact. Fed. R. Civ. P. 56(e); *Brinson v. Linda Rose Joint Venture*, 53 F.3d 1044, 1049 (9th Cir. 1995).

Secondly, the *Dwares* and *Lee* cases are factually and legally distinct. In *Dwares* the complaint alleged a prearranged agreement or conspiracy between the "skinheads" and the police that the police would take no action if the "skinheads" physically assaulted Dwares in their presence. Plaintiffs here have presented no evidence that they suffered physical injury or property damage *in the presence of* the police officers. But, more importantly, Plaintiffs have presented no evidence that the Sheriff's Department made any agreement with the students to allow harassment of the Stuters or were motivated in any sense to allow harassment of the Stuters because of the Stuter's [sic] views. Per *DeShaney*, there is no evidence that the Sheriff's Department created the situation of third-party harassment or made the Stuters more vulnerable, but rather the evidence shows regular, ongoing, and appropriate responses to the

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[7] In *Dwares* the Second Circuit affirmed the district court's dismissal of plaintiff's claims asserting municipal liability and only let the claims go forward against the officers in their individual capacities. This distinction is critical because the Stuters seek to rely on *Dwares* to establish municipal liability and have not named any of the individual deputies as defendants.

Stuters' reports. There is no evidence of the Sheriff's Department aiding and abetting the harassers. To the contrary, the undisputed evidence is that the deputies responded to countless reports and made their presence known at the annual Homecoming car rallies, at times diverting traffic and issuing traffic citations to individuals making U-turns near the Stuter residence. In fact, Plaintiffs conveyed their appreciation to the Sheriff's Department for its efforts during the 1997 and 1998 car rallies.

Plaintiffs also rely on the statement in *Lee* that whether there was deliberate indifference is generally a question for the jury. However, this would be the case only if evidence in the record could support a finding of deliberate indifference. In viewing the evidence in a light most favorable to Plaintiffs, all reasonable inferences must be drawn in the nonmoving party's favor, but such inferences are limited to those upon which a reasonably jury might return a verdict. *Triton Energy Corp. v. Square D. Co.*, 68 F.3d 1216, 1220 (9th Cir. 1995)(citations and quotations omitted). Furthermore, although whether a local government entity has displayed a policy of deliberate indifference is generally a question for the jury, it is not always a question for the jury and does not preclude summary judgment in favor of the Sheriff's Department. See *Alexander v. City and County of San Francisco*, 29 F.3d 1355, 1367 (9th Cir. 1994). Based upon the facts in record, including the constant responses by Sheriff's deputies, even to the most minor incidents such as a car driving by and honking, a beer bottle in the driveway, and a candy box in the mailbox, a reasonable jury could not conclude that the Sheriff's Department was deliberately indifferent.

Plaintiffs also seek to rely on the affidavit of their expert

witness, D.P. Blaricom, a retired law enforcement officer, to create a genuine issue of material fact as to this issue (Ct. Rec. 63). Van Blaricom stated that he was prepared to testify that the Sheriff's Department's conduct "reflects either an official complicity in the perpetrators' misconduct or a deliberate indifference." (Ct. Rec. 63). Generally, an expert opinion may defeat summary judgment if it appears that the expert is competent to give an opinion and the factual basis for the opinion is disclosed. *Triton Energy*, 68 F.3d at 1222 (9th Cir. 1995). However, here Plaintiffs' expert's opinion rests partially on an inaccurate factual basis and is not of sufficient quantum or quality to create a genuine issue of material fact. See *Triton Energy* at 1222. Van Blaricom states that "Lynn Stuter was selectively charged with disorderly conduct, while the similar conduct of students engaged in her harassment was ignored" and that this "inexplicable disparate enforcement" reflects a policy of deliberate indifference. (Ct. Rec. 63). There are two problems with this conclusion. First, Plaintiffs do not assert selective enforcement based on the conviction of Lynn Stuter for disorderly conduct and such an argument would be precluded by *Heck v. Humphrey*, 512 U.S. 477 (1994), as it would necessarily imply the invalidity of her conviction which was affirmed on appeal. Secondly, Van Blaricom equates Lynn Stuter's actions of blocking a public street with a vehicle and wielding a shotgun as "similar" to the actions of students driving by and honking and yelling. These actions are certainly not substantially similar, and this court will not substitute its judgment for that of the Sheriff's Department in dealing seriously with an individual armed with a firearm. Thus, to the extent that Van Blaricom's conclusion rests on disparate treatment and Mrs. Stuter's 1999 charge and conviction, it rests on an incorrect factual basis, as there is no showing in the record of disparate or

selective enforcement and the 1999 conviction may not serve as the basis for a claim to damages under § 1983.

When the evidence in the record is clear, the court is not required to defer to the contrary opinion of plaintiffs' expert. *In re Apple Computer Securities Litigation*, 886 F.2d 1100, 1116 (9th Cir. 1986). The court finds that no reasonable jury could find, based on the evidence in record, a policy of deliberate indifference on the part of Defendant. Additionally, Plaintiffs presented no evidence that the Sheriff's Department made any agreement, either explicitly or implicitly, with the students to allow harassment of the Stuters or were motivated in any sense to allow the harassment of the Stuters because of the Stuters' views. "A plaintiff's belief that a defendant acted from an unlawful motive, without evidence supporting that belief, is no more than speculation or unfounded accusation about whether the defendant really did act from an unlawful motive." *Carmen v. San Francisco Unified School Dist.*, 237 F.3d 1026, 1029 (9th Cir. 2001). Accordingly, Plaintiffs have not established a policy or custom of the Sheriff's Department that was the moving force behind a violation of Plaintiffs' First Amendment rights.

## CONCLUSION

Plaintiffs have no Constitutional right to a certain level or standard of police protection or investigation. Therefore, to establish municipal liability against the Sheriff's Department, Plaintiffs must demonstrate a policy or custom of Defendant that was the moving force behind the deprivation of a recognizable Constitutional right. Plaintiffs have failed to produce competent admissible evidence creating a genuine issues of material fact as to: 1) the

existence of a municipal policy or custom on behalf of the Sheriff's Department; or 2) whether the alleged policy or custom was the moving force behind a constitutional deprivation. Plaintiffs have failed to produce competent admissible evidence upon which a reasonable jury could find that the Sheriff's Department's response was deliberately indifferent. Plaintiffs have additionally failed to produce competent admissible evidence upon which a jury could find that the Sheriff's Department's actions caused the alleged suppression of speech or were in retaliation for Mrs. Stuter's advocacy during, and prior to, 1995.[8]

Accordingly, and for all the foregoing reasons,

**IT IS HEREBY ORDERED:**

1. Defendant's Motion for Summary Judgment (Ct. Rec. 104) is **GRANTED**.

2. Plaintiffs' Complaint and the claims therein are **dismissed with prejudice**.

**IT IS SO ORDERED**. The Clerk is hereby directed to enter this Order and judgment in favor of Defendant as provided herein, furnish copies to counsel, and close the file.

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[8] The court is cognizant that the Complaint contains allegations that Defendant's alleged ineffective response was in retaliation for Plaintiffs' advocacy against the Sheriff's Department. However, these claims have not been argued or developed throughout the course of this action, nor does the evidence in record support an allegation that Plaintiffs' [sic] publicly advocated *against the Sheriff's Department* and such advocacy lead the Department to respond inadequately to the harassment of Plaintiffs by the students.

**DATED** this 9th day of June, 2004

/s/ Justin Quackenbush
JUSTIN L. QUACKENBUSH
SENIOR UNITED STATES DISTRICT JUDGE

APPENDIX 64a-65a – JUDGMENT IN A CIVIL CASE GRANTING MOTION FOR SUMMARY JUDGMENT BY THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON ON JUNE 9, 2004

**UNITED STATES DISTRICT COURT**
*Eastern District Of Washington*

| | |
|---|---|
| LYNN STUTER, BYRD STUTER and MONICA STUTER, and as husband and wife,<br><br>Plaintiffs<br><br>v.<br><br>STEVENS COUNTY SHERIFF DEPARTMENT<br><br>Defendant. | JUDGMENT IN A CIVIL CASE<br><br>CASE NUMBER: CS-02-266-JLQ |

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Defendant's motion for summary judgment is GRANTED.

Plaintiffs' complaint and the claims therein are dismissed with prejudice. Judgment is entered in favor of Defendant.

June 9, 2004
Date

JAMES R. LARSEN
Clerk
/s/ Shirley Peters
(By) Deputy Clerk
Shirley Peters

# APPENDIX 66a-87a – COMPLAINT FOR DAMAGES AND DEMAND FOR JURY TRIAL FILED IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON ON AUGUST 8, 2002

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UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF WASHINGTON

| | |
|---|---|
| LYNN STUTER, BYRD STUTER and MONICA STUTER, and as husband and wife,<br><br>Plaintiffs<br><br>v.<br><br>STEVENS COUNTY SHERIFF DEPARTMENT<br><br>Defendant. | CASE NO.<br><br>COMPLAINT FOR DAMAGES AND DEMAND FOR JURY TRIAL<br><br>42 USC § 1983 |

Plaintiffs, by and through their undersigned attorneys, allege as follows:

## I. JURISDICTION AND VENUE

1. This court has jurisdiction pursuant to 28 U.S.C. §1331 over the claims herein. Plaintiff is alleging that the Defendant engaged in multiple acts infringing upon Plaintiff's constitutional rights by civil action for deprivation of those rights accruing under 42 U.S.C. § 1983.

2. Costs and reasonable attorneys fees may be awarded under 42 U.S.C. § 1988.

3. Venue herein is proper per 28 U.S.C. § 1391, as Defendant is a resident of this jurisdiction and the substantial part of the events giving rise to this cause of action occurred in this judicial district.

4. All actions giving rise to the 42 U.S.C. § 1983 action were actions done in accord with customs, policy statements, decisions officially adopted and promulgated by that body's officers, its standard operating procedures, or in accord with policy set by final policy-making authority, and/or via ratification of an official with policy making authority.

## II. PARTIES

1. Plaintiffs Lynn Stuter and Byrd Stuter are residents of Stevens County, Washington.

2. Plaintiff Monica Stuter was a resident of Stevens County, Washington until January 2001, and is now in the United States Navy stationed in Washington D.C.

3. During all times relevant herein, all Plaintiffs resided together as a family in Stevens County, Washington.

4. Defendant Stevens County Sheriff's Department is a governmental entity operating pursuant to RCW 36.28 in Stevens County, State of Washington.

## III. OPERATIVE FACTS/COMMON ALLEGATIONS

1. From 1992 through 1996, Plaintiff Lynn Stuter was an active advocate of education reform. In that regard, she engaged in an extensive exercise of her free speech rights in support of her positions.

2. Plaintiffs Byrd and Monica Stuter, Plaintiff Lynn Stuter's husband and daughter respectively, were of similar mindset and position regarding educational reform, but desired that Plaintiff Lynn Stuter be the advocate for the family's position.

3. Plaintiff Lynn Stuter attended and participated in school board meetings, wrote letters to various members and officials advocating particular view points regarding, e.g. curriculum, extra curricular activities, and student discipline and behaviors, as well as views related to investigation of fiscal occurrences and decisions she found suspect, and she responded to the information she acquired.

4. One of her more controversial views concerned cessation of funding for athletic activities in favor of emphasis on academics.

5. The speech Lynn Stuter engaged in was wholly protected by the First Amendment as matters of public concern.

6. The community of Suncrest is small in terms of population. School board members and community residents were well aware of the activism of Lynn Stuter and generally did not support her views.

7. The feedback to Plaintiff Lynn Stuter and all Plaintiffs from within the community as to her expressed views was not often positive; in fact, Plaintiffs received much negative feedback from various members of the school and community.

8. Commencing in 1994, all plaintiffs began experiencing vandalism at their home.

9. In October of 1994, Plaintiffs found that their house had been subjected to eggs and pumpkins thrown at it, and reported such incident to the Defendant Stevens County Sheriff's Department.

10. In 1995, and in spite of the unpopularity of her views, Plaintiff Lynn Stuter ran for a school board position to advocate and implement her views.

11. Substantial negative response was generated within the community to her views and was received by the Stuters in the form of letters, emails, newspaper articles, etc.

12. Incidents of vandalism, which Plaintiffs believed were clearly designed to harass or intimidate Plaintiff Lynn Stuter individually, and to do so through intimidation and harassment of her family, began occurring at regular intervals.

13. High school age children began targeting Plaintiffs' house, and targeting Plaintiff Lynn Stuter's family, by harassment. Plaintiffs believed such harassment emanated directly from Planitff Lynn Stuter's First Amendment activity.

14. Over the ensuing years, the Stuter home and family would be repeatedly targeted for harassment. Plaintiffs began to, and continued to report these incidents of harassment to Defendant Stevens County Sheriff's department.

15. Instances which were reported to the Stevens County Sheriff's Department (some were not) included:

a. In March of 1995, eggs were thrown at the Stuter's home.

b. In the summer of 1995, paintballs were shot towards and hit the Stuters' home.

c. In October of 1995, a car rally, which originated from Lakeside High School stopped in front of the Stuter home with high school students yelling obscenities.

d. In October 1995, the Stuter's home was again egged.

e. In early November 1995, the Stuters were warned of another planned egging, which they reported in advance. Such activity did not occur on the evening reported.

16. The instances of harassment were in fact crimes committed against Plaintiff Stuter and her family.

17. The instances of harassment and intimidation were seen by Plaintiff as efforts to convince her to cease her first amendments activities as to advocacy related to school reform in the community.

18. Lynn Stuter was not elected for a school board position.

19. Defendant Stevens County Sheriff's Department failed to investigate any of the above reports, except to make police reports of the Stuter's reports themselves.

20. Following her student advocacy role, and each year thereafter during homecoming week, a car rally of high school students from Lakeside High School would drive through the community and target the Stuter home for harassment. This would include shouting obscenities, attempts to intimidate and threaten the Stuters with property damage and with physical harm.

21. All such incidents were reported to the Defendant Stevens County Sheriff's department.

22. In October of 1996, eggs and tomatoes were thrown at the Stuter residence by juveniles the same evening of the 1996 Lakeside High School car rally. This incident was reported to the Stevens County Sheriff's Department.

23. Less than two weeks later, a chunk of brick was thrown at and hit the Stuter house, having apparently been aimed at a window. This incident was reported to the Stevens County Sheriff's Department.

24. Two months later, in December, 1996, white paintballs were shot at the Stuter's home. This incident was reported to the Stevens County Sheriff's Department.

25. Two months later, in February, paintballs were shot at the Stuter's home from a moving vehicle. This incident was reported to the Stevens County Sheriff's Department.

26. The following day, on February 22, 1997, a suspicious car stopped in front of the Stuter residence, which was reported to the Stevens County Sheriff's Department.

27. Some five months later, in July, 1997, an explosive device was thrown into the Stuter's yard at 1:00 a.m. and left a volleyball size hole in the front lawn. This incident was reported to the Stevens County Sheriff's Department.

28. Less than two weeks later, McDonald's sauces in condiment cups were thrown at the Stuter's attached garage. This incident was as well reported.

29. From August through October of 1997, the Stuters suffered nine other incidents similar to the foregoing, including:

a. a suspicious vehicle seen at the Stuters' mail box;

b. a bundle of firecrackers going off at the Stuters' gate;

c. a report that "bad stuff" would happen at their residence in conjunction with the car rally;

d. a car rally that made passes in front of the Stuters' residence the same day wherein high school students directed obscenities towards the Stuters and threatened to throw objects at the Stuters' home. In fact, the Stuters'

home was struck with thirteen paintballs at approximately 3:00 a.m. thereafter;

e. juveniles passed shouting obscenities, and,

f. an incident involving in excess of forty red paintballs were directed against the front door of the residence;

g. a driver of a vehicle parked in front of the home, and yelled obscenities directed towards the Stuters;

h. a suspicious vehicle passed by the Stuters' home four times with its windows rolled down in 40° weather.

30. All of the above incidents were reported to the Stevens County Sheriff's Department with request for assistance.

31. The continuation of such incidents literally terrorized Plaintiffs in their own home, creating fear, paranoia and constant anxiety.

32. In spite of contacting Stevens County Sheriff's Department, no action was taken to either investigate or determine the perpetrators of these incidents, or to contact Lakeside School District in an attempt to provide for any alternative means of resolving the harassment.

33. Instead, the Steven's County Sheriff's Department advised the Stuters that these criminal actions constituted the exercise of free speech by the students.

34. Due to inaction of the Sheriff's Department, it became a tradition at the school and in the community for high school age children to harass the Plaintiffs at their home, and terrorize them. The actions of the students became pure and simple criminal harassment.

35. By 1997, as a result of the complete failure of police protection, Plaintiffs had nearly ceased outspoken public advocacy of their educational reform views.

36. As a result of continuing to suffer damage due to inaction of the Stevens County Sheriff's Department, Plaintiff Lynn Stuter began directing her advocacy towards the Stevens County Sheriff's Department for failure to protect her and her family.

37. Plaintiffs Byrd and Monica Stuter were afraid to voice their educational reform views, but desired that Plaintiff Lynn Stuter advocate for them.

38. In 1998, the Stuter's home was subjected to a beer bottle thrown at the home with significant force and found smashed in the driveway.

39. In 1998, teenage males drove past the house yelling obscenities at the Stuters.

40. In September of 1998, a car rally again passed in front of the Stuters' home, with students yelling obscenities. This car rally was videotaped by the Stuters, and Defendant Sheriff's deputies knew of the videotaped evidence but did nothing material to investigate or address the actions of the perpetrators.

41. Following the video taping of the 1998 car rally, the Stuters showed the videotape to Sergeant Caruso of the Defendant Sheriff's Department and, in complete frustration over failure to obtain any protection, informed him that the Sheriff's Department deputies may get sued unless they somehow assisted.

42. Plaintiff Lynn Stuter was by this time actively advocating against the Defendant Sheriff's department for what she perceived as their ineptness in handling the situation of criminal harassment of her family.

43. Following Plaintiff's initiation of advocacy against the Stevens County Sheriff's Department itself, Sheriff's department reports on incidents reported by the Stuters would consistently document, not the actions taken against the perpetrators of crimes against the Plaintiffs, but how the Stuters' reactions, particularly those of Plaintiff Lynn Stuter, were inappropriate when officers came to investigate.

44. Harassing incidents continued throughout 1998, including suspicious vehicles driving past the Stuters' home, cars driving past their home with horns blaring and drivers gesturing towards the Stuters', beer bottles being thrown at the Stuters' home, and explosions occurring near the Stuters' home.

45. No action was taken by the Stevens County Sheriff's Department on any of these incidents.

46. Activities such as the above continued in early 1999, including:

a. On August 9, 1999, an egg with an explosive device (M-70 firecracker) taped to it was found 3-ft from the east end of the Stuters' driveway.

b. Earlier in the morning, two separate vehicles had driven past the house honking their horns, one vehicle, a blue Chevy, having passed by twice.

c. On September 22, 1999, an explosive device was found in Stuters' rose garden. The police classified it as a firework.

47. On September 29, 1999, a car rally of students in fact again passed repeatedly in front of the Stuter home until the lead vehicle stopped, several students got out and bent down, as if they would be throwing rocks.

48. Fearing another "car rally" incident such as occurred without protection in September 1998, Plaintiff Lynn Stuter made an active attempt to physically prevent the harassers from accessing the road closest to her residence to protect herself and her family due to the lack of police protection.

49. Plaintiff Lynn Stuter attempted to defend her home by parking her truck in the middle of the road closest to her residence and standing outside the cab of her truck with shotgun in hand, to deter the harassment of the students and protect her home.

50. The Stevens County Sheriff's Department responded, and cited Lynn Stuter for "disorderly conduct."

51. Such arrest was retaliatory on the part of Stevens County Sheriff's deputies, who by then didn't like the way Plaintiff Stuter advocated against the Department.

52. In November of 1999, the Stuters' received emails appearing to be threats.

53. In December, a Deputy of the Stevens County Sheriff's Department finally investigated one car driving by and honking his horn, and obtained an admission from the participant that he had been involved in the incident.

54. Incidents continued throughout the year 2000, and the Stuters' reported eight such incidents, including:

a. cars driving by honking horns,

b. students taunting the Stuters by verbal insult,

c. an empty 38 shell cartridge found in rocks near the driveway,

d. 25 feet of video tape tied to the Stuters' fence, and

e. yet another Lakeside student rally wherein the Sheriff's department finally handing out tickets for traffic violations.

55. The passive nature of Defendants' response to these harassing acts over the years emboldened and encouraged the perpetrators to engage in continued vandalism and threats.

56. Such actions continued to cause extreme fear, paranoia and anxiety to the Stuter family.

57. Vandalism continued through the year 2001, including beer bottles thrown at the Stuter home, another student car rally outside the Stuter home in October of 2001, and cars driving past honking and yelling obscenities at the Stuters.

58. In October of 2001, a student car rally again occurred, with obscenities again being yelled as the rally passed the Stuter house. Deputies again did nothing but give tickets for U-turns to the drivers.

59. Pursuant to the above, the Stuters' have been continuously harassed according to RCW 9A.46.020, the target of malicious mischief according to RCW 9A.48.090, and the object of criminal conspiracies according to RCW 9A.28.040, and have consistently reported and complained to the Defendant Sheriff's department about said activities.

60. The Defendant Sheriff's department should have addressed the behavior of the students as harassing, of a criminal conspiracy nature, and with intent to cause or commit malicious mischief, fear and intimidation due certainly early on, to Plaintiff's exercise of her free speech right. Yet, the Defendant department refused to provide material assistance, protection or resolution.

61. Such refusal became outright Department retaliation against the Stuters for the exercise of their free speech advocacy against the Department itself.

62. The Departments' refusal to act was alternatively done because of a lack of proper training, with a deliberate indifference to the constitutional rights of Lynn Stuter.

63. While responding to their calls and reports, though oftentimes not in a timely fashion, beyond that, the Defendants jointly conducted little to no investigations, with few to no prosecutions occurring.

64. Further, instead of investigating and prosecuting the perpetrators, Defendants instead selectively enforced a criminal violation against Plaintiff Lynn Stuter for disorderly conduct.

## IV. CAUSES OF ACTION

Wherefore, having asserted the above at par 1 through 63, the Plaintiffs allege as causes of action the following:

65. From 1992 through 1996, Plaintiff Lynn Stuter engaged in the exercise of her first amendments rights with respect to school reform on her behalf and on behalf of her family, and she and her family were the recipient of ongoing harassment by school personnel and students, for what Plaintiffs believed was the result of Plaintiff Stuter's advocacy.

66. In reporting to the Stevens County Sheriff's Department efforts directed towards her to quell the exercise of her first amendment rights, the Stevens County Sheriff's Department failed to provide proper assistance.

67. Such failure was the result of the Stevens County Sheriff's office's failure to properly train said officers,

exhibiting indifference to the Constitutional rights of Plaintiffs.

68. The failure to properly train police officers to recognize illegal activity within the car rallies gave the Stuters the understanding that there was no chance the Stuters could receive police protection from the student harassment.

69. Commencing in 1997 through the year 2002, the ineffectiveness of Sheriff's deputies in addressing ongoing criminal conduct directed at the Stuters was so pervasive as to cause the Stuters to begin advocacy directed towards the Defendant Sheriff's Department itself.

70. As a direct result of her advocacy against them, the Stevens County Sheriff's Department not only directly refused to address the ongoing harassment of the Stuters, but engaged in active retaliation towards the Stuters by:

a. affirmatively, impermissibly and selectively denying them the benefits of police protection and prosecution of their harassers;

b. engaging in selective enforcement of Lynn Stuter for disorderly conduct while she was being set upon by students engaged in harassment of her.

71. The above conduct constitutes ongoing violations of the Plaintiffs' civil rights, and arose from Defendant Stevens County's continuing failure to train said deputies, thereupon creating both denial of benefits and retaliatory selective enforcement.

72. Such actions as identified in par. 64 – 70 resulted in the violation of Plaintiffs' civil rights, as in that such failures and affirmative acts were in violation of Plaintiffs' exercise of her First Amendment rights and designed to quell such rights.

73. Further, said violations of Plaintiffs' civil rights arose as well in part and directly from Plaintiff Lynn Stuter's exercise of her first amendment rights, and was in retaliation therefore, and designed to quell said rights on her behalf and her family through her.

74. All the violating activities of the Sheriff's office was consistent over the years and engaged in by many different officers, evidencing that the Sheriff's office was acting under the influence of a custom or policy, or with authority from a policy making authority.

75. Such violations of Plaintiffs' civil rights directly caused the need for Plaintiff Lynn Stuter to reasonably attempt to protect herself and her family from her harassers, and her efforts to prevent the perpetrators from entering her home territory by the use of her vehicle, even as a traffic violation became necessary and proper. The citation of Plaintiff for such defense constituted selective and retaliatory actions on the part of Defendant.

76. Plaintiff Lynn Stuter suffered unwarranted damage in having to actually commit a crime to protect herself and her family, due to the failure of the Defendant to provide benefits of protection to her.

77. Such conduct as alleged in paragraphs 64 - 75 constitutes a violation of 42 USC § 1983, in that:

a. the Defendant Sheriff department is a state actor acting under color of state law, policy, ordinance, regulation, policy maker, custom or decision officially adopted and promulgated by that body's officers;

b. such actions caused a deprivation of Plaintiffs' constitutional rights;

c. the constitutional right of protected free speech is clearly established by federal law, and the actors had sufficient knowledge of the facts causally connecting the free speech rights, the harassment, and the prosecution, that the public official could not have reasonably believed their conduct was protected by immunity.

78. Such conduct alleged in paragraphs 64 - 75 constitutes a violation of 42 U.S.C. 1983 in that:

a. the Defendant Sheriff department is a state actor acting under color of state law, policy, ordinance, regulation, policy maker, custom or decision officially adopted and promulgated by that body's officers;

b. its training policies or customs were a moving force behind the constitutional violations;

c. the failure to properly train was a result of a deliberate indifference to the constitutional rights of Plaintiff Lynn Stuter, and, through such, the rights of Plaintiffs Byrd and Monica Stuter;

d. deliberate indifference is evidenced by the obvious need to investigate the Stuters' situation given the number of

times the Stuters have reported criminal acts of harassment against them, and the fact that the number of incidents may amount to a Steven's county record, that this should have thereby alerted the department to a perceived problem, making the need for more or different training obvious, with inadequacies in the same to likely result in the violation of constitutional rights.

e. police reports obviously show the Stuters were fearful for their lives and had even told the officers why they believed they were being harassed, which should have further alerted the department to the predictable Constitutional rights violations or self help/self defense reactions by a citizen.

79. As a direct result of said violations, the Stuter family, and particularly Lynn Stuter, experienced continuing and profound mental and emotional stress.

80. As a result of said violations, which put Plaintiff Lynn Stuter and her family in what Plaintiff Lynn Stuter viewed as grave danger, Plaintiffs' rights to free speech were directly impacted and curtailed.

81. Damages were, have been, and are being incurred by Plaintiffs as a result of said continuing violations of civil rights.

82. The proximate cause of Plaintiff Lynn Stuter's 1999 criminal charge for disorderly conduct was due to the inactions, constituting constitutional violations, perpetuated by the Defendant Sheriff's department.

83. The entire family of Plaintiff Lynn Stuter has been continuously harmed, subject to harassment, ridiculed and emotionally damaged by the conduct of Defendant, and such damage has further increased the damage to Plaintiff Lynn Stuter in the form of emotional distress in watching her family subjected to ridicule and harm purely from her exercise of her first amendment rights.

84. As a direct and proximate result of the Defendant's conduct in violation of Plaintiffs' First Amendment rights, and in accord with Defendant's policy or custom, Plaintiffs have suffered substantial general damages, consequential damages, and special damages.

85. As a direct and proximate result of the Defendant's ongoing conduct in violation of Plaintiffs' First Amendment rights, Defendant should be assessed an appropriate punitive amount and amount necessary to deter further free speech violations, and Plaintiffs should be the recipient thereof.

86. As a direct and proximate result of Defendant's discriminatory conduct in violation of Plaintiffs' rights, actionable under 42 U.S.C. § 1983, Plaintiffs have incurred and will incur fees and costs regarding this action.

## V. CAUSATION AND DAMAGES

87. Plaintiffs hereby reallege each and every allegation as set forth in paragraphs I.1 through IV.85.

88. As a direct and proximate result of the aforementioned acts in violation of Plaintiffs' civil rights to the free exercise of speech, the Plaintiffs have suffered substantial harm, and such harm should be monetarily

compensated, to include compensation for punitive, consequential, general, and special damages, attorney fees and costs.

## VIII. JURY DEMAND

89. A jury trial is requested.

## IX. PRAYER FOR RELIEF

WHEREFORE, Plaintiffs seek the following relief:

90. Judgment for damages against Defendant, in the sum of not less than $15,000,000.

91. Punitive damages in an equal sum.

92. Pre-judgment interest at 12% per annum on the above, prorated as the damages accrued.

93. Post judgment interest at the rate of 12% per annum.

94. Any and all fees and costs associated with this action.

95. Any and all fees incurred in defense of the selective enforcement and prosecution of Plaintiff Lynn Stuter for the necessity of her engaging in actions which in fact constituted a crime purely to protect herself given the rights violations engaged in herein by Stevens County.

**DATED** this 8th day of August, 2002.

**MARY SCHULTZ & ASSOCIATES, P.S.,**

/s/ Mary Schultz

**Mary Schultz** WSBA #14198
Attorney for Plaintiffs

(2)

Supreme Court, U.S.
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No. 06-222

IN THE

# Supreme Court of the United States

LYNN STUTER, *et al.*,

*Petitioners,*

*v.*

STEVENS COUNTY SHERIFF DEPARTMENT,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

## BRIEF IN OPPOSITION

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## INTRODUCTION

Petitioners have presented no "compelling reasons" for their Petition for a Writ of Certiorari ("Petition") to be granted. Specifically, Petitioners fail to establish that the Ninth Circuit's May 12, 2006 unpublished decision (Decision) is in conflict with any decision of any other United States Court of Appeals on the same important matter, or that the Decision decided an important federal question in a way that conflicts with relevant decisions of this Court.

Petitioners assert two basic arguments in support of their Petition, both of which are not supported by the law or the facts. First, Petitioners argue that the Decision is in conflict with *Dwares v. City of New York*, 985 F.2d 94 (2nd Cir. 1993). Second, Petitioners argue that this Court should examine whether the "evolving state created danger" exception to this Court's decision in *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989) is "sound." As set forth herein, the Ninth Circuit's Decision is not only consistent with well-established law regarding the "state created danger" doctrine, it is also entirely consistent with the holding of, and sound policy behind, *DeShaney* and it progeny. As such, Respondent Stevens County respectfully submits that this Court should deny the Petition for Writ of Certiorari.

## STATEMENT OF THE CASE

In very summary form, this case involves acts of alleged harassment and/or criminal conduct directed at Petitioners by private, third-party actors. The issue before the lower courts, and the issue before this Court, is whether Respondent can be liable to Petitioners for failing to stop the alleged harassment and criminal conduct, or whether, as was

concluded by the trial court and the Ninth Circuit Court of Appeals, such claims are precluded by *DeShaney v. Winnebago*.

In answering this question, there are two undisputed facts of particular note. First, the alleged harassment was conducted by third-party actors (local high school students), and there has never been the allegation that Respondent affirmatively participated in the harassment. Second, the harassment, which commenced in 1995, was allegedly the result of Lynn Stuter's position on educational reform. *Pet.App. 30a-31a*. The harassment thus predated any involvement from Respondent. *Pet.App. 6a*. As such, Respondent did not "create" the harassment/danger complained of by Petitioners. *Pet.App. 52a-53a*.

Since Respondent did not "create" the harassment/ danger, and since Respondent did not "participate" in the harassment, the question is whether Respondent's purported failure to protect Petitioners from that harassment deprived Petitioners of any constitutionally-protected rights. While Petitioners now, in an effort to avoid the preclusive affect of *DeShaney*, claim the existence of a "conspiracy" between Stevens County deputies and the third-party actors, whereby the deputies "ratified" and "supervised" the alleged harassment, the central tenet of Petitioners' theory of liability in this case has always been that Respondent "failed to act" to protect Petitioners from the harassment. In fact, in their Complaint, Petitioners very specifically alleged that Respondent "failed to investigate" the complaints of harassment (*Pet.App. 72a*); failed to investigate or "determine the perpetrators of [the harassment]" (*Pet.App. 74a*); took "no action" with respect to the complaints (*Pet.App. 76a*); "refused to provide material assistance, protection or

resolution" relating to the complaints (*Pet.App. 79a*); "conducted little to no investigations" into the complaints (*Pet.App. 80a*), and; "failed to provide proper assistance" on the complaints (*Pet.App. 80a*).

Now, having had both the trial court and the Ninth Circuit find their claims precluded by *DeShaney*, Petitioners attempt to obtain review by this Court by mischaracterizing the extent and nature of the "harassment" to which they were exposed, and more importantly, Respondent's knowledge of, and response to, that harassment. In that regard, Petitioners have incorrectly and repeatedly asserted that Respondent ratified or incited the "criminal conduct" of the harassers by failing to "criminally cite [the] teenagers." *Petition, pg. 4.* In the most blatant misstatement in that regard, Petitioners assert that Respondent "viewed, supervised in some cases, and failed to address or remedy" alleged criminal behavior. *Petition, pg. 14.* Petitioners' assertions in this regard are both misleading and a mischaracterization of the record, as there is no evidence that any deputies ever "viewed" or "supervised" any criminal behavior. Rather, the evidence establishes that while the deputies responded repeatedly and without fail to Petitioners' numerous requests for officer contact, the "criminal conduct" Petitioners claim to have been exposed to was neither "viewed" nor "supervised" by any deputy. In arguing to the contrary, Petitioners "mix and match" alleged criminal conduct that occurred outside the deputies' presence, by persons unknown to the deputies, with non-criminal conduct that may have occurred in the deputies' presence. Respondent will clarify those mischaracterizations herein.

The "harassment" to which Petitioners were subjected can generally be separated into two categories: (1) conduct

that occurred during the annual homecoming car rally; and (2) conduct that occurred at other times. This distinction is necessary, as the evidence establishes that the alleged criminal conduct complained of by Petitioners (i.e., the shooting of paintballs at Petitioners' house) was not "viewed" or "supervised" by any deputies, making it impossible to find that the deputies condoned, encouraged, supported or incited the conduct by not issuing criminal citations for the same.

**1. The Annual Lakeside High School Homecoming Car Rallies.**

According to Petitioners, the annual Lakeside High School homecoming car rally first "targeted" their house on October 27, 1995. *Pet.App. 31a.* Petitioners alleged that the participants in the car rally yelled obscenities as the cars drove past Petitioners' house. *Id.* There is no evidence, or assertion, that any deputy viewed or supervised the car rally, let alone any unidentified criminal conduct that may have occurred during the same.

On October 16, 1996, the car rally again proceeded by Petitioners' house. *Id.* This time, eggs and tomatoes were allegedly thrown at Petitioners' house by participants in the rally. *Id.* Subsequent to the rally, Petitioners reported the conduct to Respondent. *Id.* Again, there is no evidence, or even assertion, that any deputy viewed or supervised the rally or any of the conduct of its participants. To the contrary, the evidence establishes that Respondent was not made aware of the conduct until *after* it had occurred.

The next car rally occurred on September 24, 1997. *Pet.App. 32a.* This time, Respondent was called during the car rally. *Id.* A deputy responded, disbursing the participants

when he activated his lights and (possibly) siren. *Id.* Subsequently, Mrs. Stuter wrote a letter to Respondent acknowledging the deputies' efforts at deterring the conduct, and extending her thanks for the same. *Id.* There is no evidence, or assertion, that any deputy viewed or supervised any criminal conduct occurring in the 1997 rally.

The 1998 homecoming car rally occurred on September 30, 1998. *Id.* After the rally had made several passes by Petitioners' house, Stevens County deputies diverted the cars away. *Id.* Respondent had in fact stationed multiple patrol cars to be present during the rally, and even had a deputy stationed in Petitioners' driveway during the rally. *Pet.App. 32a-33a.* There is no evidence that any deputy viewed or supervised criminal conduct that may have occurred during the 1998 car rally. In fact, subsequent to the rally, Mrs. Stuter again thanked Stevens County for its efforts during the rally. *Pet.App. 33a.*

On September 29, 1999, the annual car rally again proceeded by Petitioners' house. *Pet.App. 33a-34a.* In response, Mrs. Stuter parked a vehicle in the road, blocking oncoming traffic. *Pet.App. 34a.* Mrs. Stuter stood in the road, armed with a shotgun. *Id.* A deputy was called to the scene and was able to convince Mrs. Stuter to move her vehicle off the road. *Id.* The deputy subsequently referred the matter to the prosecutor, who made the decision to file disorderly conduct charges against Mrs. Stuter. *Id.* There is no evidence that any deputy viewed or supervised any alleged criminal conduct that may have occurred during the 1999 car rally (except for the criminal conduct of Mrs. Stuter).

There was apparently no homecoming car rally in 2000.

The 2001 car rally occurred on October 5, 2001. *Id.* Two deputies patrolled the area around Petitioners' house that evening, ticketing ten different vehicles for various traffic infractions. *Pet.App. 36a.* There is no evidence that either deputy viewed or supervised any criminal conduct that may have occurred during that rally.

The 2002 car rally did not drive in front of Petitioners' house. *Pet.App. 37a.*

**2. Alleged Conduct Occurring At Times Other Than During The Car Rallies.**

Petitioners contend that between 1995 and 2004, they were subjected to various acts of harassment by unknown persons at varying times of the day and night. These various acts of harassment ranged from firecrackers being thrown into Petitioners' yard (*Pet.App. 32a*), to having videotape strung along their fence (*Pet.App. 35a*), to having a beer bottle thrown into their yard (*Pet.App. 35a*), to having persons drive by their house and honk (*Id.*), to having candy wrappers put in their mailbox (*Pet.App. 38a*).

The evidence regarding the non-car-rally "harassment" establishes two things. First, it is "beyond any possible dispute that the Sheriff's Department invested a great deal of time and resources responding to approximately 70 reports" from Petitioners (*Pet.App. 44a*), during which the deputies took reports, collected evidence and attempted to obtain fingerprints (*Pet.App. 44a, 46a*). Second, and perhaps more importantly, none of the alleged criminal conduct was "viewed" or "supervised" by Respondent. The record is entirely devoid of any evidence that Respondent witnessed firecrackers being thrown in Petitioners' yard,

persons shooting paintballs at Petitioners' house, trash being thrown in Petitioners' yard, etc. So, while Petitioners are correct that with one exception, the deputies have not "criminally cite[d] teenagers" for their conduct, the implication that the deputies had any basis to "criminally cite teenagers" is unsupported. Not only is there a complete lack of any evidence that any deputies observed any of the alleged criminal conduct, there is a similar lack of any evidence that the deputies even knew who committed the alleged criminal conduct. In the absence of such evidence, there is a corresponding lack of any evidence that the deputies in any way encouraged, supported, supervised, incited or sponsored the alleged conduct by not issuing criminal citations.

## REASONS FOR DENYING PETITION

### 1. The Ninth Circuit Court Decision Does Not Conflict With *DeShaney v. Winnebago*, Or With Ninth Circuit State-Created Danger Jurisprudence.

In *DeShaney v. Winnebago County Dept. of Social Services*, this Court held that the return of a child in temporary custody to an abusive father did not state a substantive due process claim. In so holding, the Court made clear that as "a general matter," a "State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." *DeShaney*, 489 U.S. at 197. In reaching this result, the Court emphasized that "[w]hile the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them." *Id.* at 201. The state escaped liability because

"it placed [Joshua] in no worse position than that in which he would have been had it not acted at all." *Id.* at 201.

Lower courts were quick to respond to the Court's language regarding the state not placing Joshua in a "worse position" than he would have been in if the state had not acted at all, and from it, the "danger creation" doctrine has become a fixture of due process jurisprudence. The Ninth Circuit first recognized the "danger creation" doctrine in *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989). In *Wood*, a state trooper determined that the driver of an automobile was intoxicated, arrested the driver and impounded the car. The officer's actions allegedly left Wood, a female passenger, stranded late at night in a known high-crime area. Subsequently, Wood accepted a ride from a passing car and was raped. The Ninth Circuit held that Wood could claim § 1983 liability, since a jury could find "that [the trooper] acted with deliberate indifference to Wood's interest in personal security under the fourteenth amendment." *Id.* at 588.

Since *Wood*, the Ninth Circuit has held state officials liable in a variety of circumstances for their roles in creating or exposing individuals to danger they otherwise would not have faced. *See L.W. v. Grubbs*, 974 F.2d 119 (9th Cir. 1992) ("*Grubbs*") (holding state employees could be liable for the rape of a registered nurse assigned to work alone in the medical clinic of a medium-security custodial institution with a known, violent sex-offender); *Penilla v. City of Huntington Park*, 115 F.3d 707 (9th Cir. 1997) (holding as viable a state-created danger claim against police officers who, after finding a man in grave need of medical care, cancelled a request for paramedics and locked him inside his house); *Munger v. City of Glasgow*, 227 F.3d 1082 (9th Cir. 2000) (holding police

officers could be held liable for the hypothermia death of a visibly drunk patron after ejecting him from a bar on a bitterly cold night).

These cases establish that state actors may be held liable "where they affirmatively place an individual in danger," *Munger*, 227 F.3d at 1086, by acting with "deliberate indifference to [a] known or obvious danger in subjecting the plaintiff to it," *L.W. v. Grubbs*, 92 F.3d 894, 900 (9th Cir. 1996) ("*Grubbs II*"). Thus, in

> examining whether an officer affirmatively places an individual in danger, we do not look solely to the agency of the individual, nor do we rest our opinion on what options may or may not have been available to the individual. Instead, we examine whether the officer[ ] left the person in a situation that was more dangerous than the one in which they found him.

*Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1062-63 (9th Cir. 2006).

Case law in the Ninth Circuit is clear. The state-created danger doctrine requires more than a mere failure to act; it requires the state official to take an affirmative action. *See Penilla v. City of Huntington Park*, 115 F.3d at 710 ("[I]f affirmative conduct on the part of a state actor places a plaintiff in danger, and the officer acts in deliberate indifference to that plaintiff's safety, a claim arises under § 1983."). The plaintiff must also prove that the official's act did more than simply expose the plaintiff to a danger that already existed. *Grubbs*, 974 F.2d at 121. Finally, the plaintiff must prove that the official acted with deliberate indifference to known or obvious dangers. *Grubbs II*, 92 F.3d at 900. This is the exact standard applied by the Ninth Circuit in its Decision in this matter.

Citing *Kennedy v. City of Ridgefield*, the Ninth Circuit in this case noted that the "predicate question" in the danger-creation analysis is whether Respondent took any "affirmative actions" that placed the Stuters "in danger that [they] otherwise would not have faced." *Pet.App. 6a.* Answering this question in the negative, the Ninth Circuit noted that "the harassing activities predated any involvement by the Department, and the record is devoid of evidence that any affirmative action by the Department increased the danger posed to the Stuters in a manner sufficient to satisfy the *Kennedy* requirements." *Pet.App. 6a.* In so holding, the Ninth Circuit's Decision is entirely consistent with the law in the Ninth Circuit regarding the "danger-creation" doctrine.

The Ninth Circuit's Decision is likewise entirely consistent with this Court's decision in *DeShaney v. Winnebego* and subsequent case law. In *DeShaney*, the Court noted that the "Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual."). *DeShaney*, 489 U.S. at 196. "As a general matter, . . . a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." *DeShaney*, 489 U.S. at 197. It is only when the state, by the "affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself," the state may incur an "affirmative duty to protect" the individual. *DeShaney*, 489 U.S. at 200. "[T]he affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf." *DeShaney*, 489 U.S. at 200.

Recently, this Court reaffirmed the principle behind its ruling in *DeShaney*:

> In light of today's decision and that in *DeShaney*, the benefit that a third party may receive from having someone else arrested for a crime generally does not trigger protections under the Due Process Clause, neither in its procedural nor in its "substantive" manifestations. This result reflects our continuing reluctance to treat the Fourteenth Amendment as "'a font of tort law,'" *Parratt v. Taylor*, 451 U.S. 527, 544, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981) (quoting *Paul v. Davis*, 424 U.S., at 701, 96 S. Ct. 1155), but it does not mean States are powerless to provide victims with personally enforceable remedies. Although the framers of the Fourteenth Amendment and the Civil Rights Act of 1871, 17 Stat. 13 (the original source of § 1983), did not create a system by which police departments are generally held financially accountable for crimes that better policing might have prevented, the people of Colorado are free to craft such a system under state law. *Cf. DeShaney*, 489 U.S., at 203, 109 S. Ct. 998.

*Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 125 S. Ct. 2796, 2810 (2005).

A Writ of Certiorari is not proper or necessary in this case, as the Court of Appeals' Decision is entirely consistent with both the law of this Court and the law of the Ninth Circuit. *DeShaney* is very clear that the due process clauses generally confer no affirmative right to governmental aid.

Petitioners' claims against Respondent are premised upon the theory that Respondent had an affirmative duty to provide government aid – "protection" against the harassment of private actors. The Ninth Circuit's Decision is consistent with *DeShaney*. The Ninth Circuit's Decision is similarly consistent with Ninth Circuit jurisprudence regarding the "state created danger" exception to *DeShaney*. There are simply no facts supporting a conclusion that Respondent in any way left Petitioners in a "worse position" as a result of Respondent's purported failure to stop the harassment.

**2. The Ninth Circuit Court Of Appeals' Decision Does Not Conflict With The Second Circuit's Decision in *Dwares v. City of New York*.**

As an initial matter, while Petitioners argue that the Ninth Circuit's Decision "conflicts" with *Dwares v. City of New York*, it should be noted that Petitioners have failed to identify *how* the two decisions conflict. In reality, the two decisions are entirely consistent, and Petitioners are simply in disagreement with the Ninth Circuit's conclusion that unlike *Dwares*, there are no facts in this matter that support a finding of a "prearranged official sanction" of the criminal conduct.

In *Dwares v. City of New York*, the plaintiff (Dwares) attended a flag-burning demonstration. Although he did not participate in the flag-burning demonstration, he voiced his support for those who did. Also present at the demonstration were some "skinheads," who were known to local law enforcement officers to have a history of racism and engaging in "violent attacks on individuals engaged in lawfully protected First Amendment activity." *Dwares*, 985 F.2d at 96. During the demonstration, Dwares was attacked by the skinheads. The "prolonged felonious attack" on Dwares

occurred in the presence of the defendant police officers. *Id.* In his complaint, Dwares alleged that the skinheads and the defendant police officers

> had conspired and/or agreed amongst themselves to permit the "skinheads" to harass and assault those who wished to express their First Amendment rights by burning an American flag, as well as those who supported the right of individuals to express themselves in that way, so long as this conduct did not get totally out of control.

The trial court dismissed Dwares's claim pursuant to the defendants' FRCP 12(b)(6) motion. In addressing whether the complaint stated a viable cause of action, the Second Circuit noted:

> We read the *DeShaney* Court's analysis to imply that, though an allegation simply that police officers had failed to act upon reports of past violence would not implicate the victim's rights under the Due Process Clause, an allegation that the officers in some way had assisted in creating or increasing the danger to the victim would indeed implicate those rights. At least one other Circuit Court has adopted this interpretation.

*Dwares*, 985 F.2d at 99.

The Second Circuit distinguished the case from *DeShaney* because the complaint "went well beyond allegations that the defendant officers merely stood by and did nothing, and that circumstances were merely suspicious."

*Id.* Unlike *DeShaney*, the state in *Dwares* made the plaintiff "more vulnerable to assaults" because of the "prearranged official sanction" whereby the skinheads could "beat up flag burners with relative impunity." *Dwares*, 985 F.2d at 99

Recently, the Second Circuit explained its decision in *Dwares*:

> In *Dwares v. City of New York*, 985 F.2d 94 (2nd Cir. 1993), we read *DeShaney* to imply that, though an allegation simply that police officers had failed to act upon reports of past violence would not implicate the victim's rights under the Due Process Clause, an allegation that the officers in some way had assisted in creating or increasing the danger to the victim would indeed implicate those rights. *Id.* at 99. The plaintiff in *Dwares* was a participant in a political rally in New York's Washington Square Park that involved the burning of an American flag. *Id.* at 96. He had allegedly been assaulted by "skinheads" as a result. *Id.* The plaintiff alleged that police officers who were present at the time had indicated to the skinheads in advance that the police would not interfere with the assaults nor arrest those responsible for them. *Id.* at 96-97. We thought *DeShaney* to be distinguishable because the complaint "went well beyond allegations that the defendant officers merely stood by and did nothing." *Id.* at 99.

*Pena v. DePrisco*, 432 F.3d 98, 108 (2nd Cir. 2005)

The Second Circuit further noted that in *Dwares*, the Court had "concluded that '[s]uch a prearranged official

sanction of privately inflicted injury would surely have violated the victim's rights under the Due Process Clause.'" *Pena*, 432 F.3d at 108. In applying the "state created danger" principle, the Second Circuit has "sought to tread a fine line between conduct that is 'passive' as in *DeShaney* and that which is 'affirmative' as in *Dwares*." *Pena*, 432 F.3d at 109. For example, in *Hemphill v. Schott*, 141 F.3d 412 (2nd Cir. 1998), the Second Circuit concluded that the Due Process Clause could be violated when officers who were called to the scene of a drugstore robbery had allowed the store's manager to join them in pursuit of the suspect and then returned a gun to the manager, who then used it to shoot the plaintiff. *Id.* at 418-20. Conversely, in *Pitchell v. Callan*, 13 F.3d 545 (2nd Cir. 1994), the Second Circuit could discern no constitutional violation when an off-duty police officer did no more than fail to stop another off-duty police officer from shooting a houseguest. *Id.* at 549.

The law in the Second Circuit is not only clear, it is entirely consistent with both the Decision in this matter, and Ninth Circuit law in general:

> It is clear from the cases, we think, that to the extent that the plaintiffs allege merely that the individual defendants failed to intercede on the day of the accident, their complaints do not involve sufficient affirmative acts to violate substantive due process rights. Similarly, to the extent that the plaintiffs allege that Grey's supervisors "stood by and did nothing" to punish Grey's previous misconduct, we think those allegations are also inadequate to state a substantive due process claim. A failure to interfere when misconduct takes place, and no

> more, is not sufficient to amount to a state created danger. Under *DeShaney*, "allegations that the defendant officers merely stood by and did nothing" are insufficient to state a constitutional violation. *Dwares*, 985 F.2d at 99.

*Pena*, 432 F.3d at 110.

This is entirely consistent with Ninth Circuit law regarding "state created dangers," as well as the Ninth Circuit's Decision in this matter. In fact, the Ninth Circuit's Decision specifically noted that this case was "unlike *Dwares*," as there were no affirmative acts by Respondent which "emboldened the private actors." *Pet.App. 6a.*

The "predicate question" in all "danger creation" cases, whether in the Ninth Circuit or the Second Circuit, is whether or not the state engaged in "affirmative conduct" that caused or increased the danger to the plaintiff. The Ninth Circuit in *Stuter v. Stevens County* very specifically answered this question, finding the record was "devoid" of any evidence of "affirmative action" by Stevens County which "increased the danger posed to the Stuters." The Ninth Circuit's opinion is thus entirely consistent with *Dwares*, where the Second Circuit found that the complaint alleged more than passive non-action by the state. As such, there is no basis or necessity for the granting of a Writ of Certiorari.

### 3. Both *DeShaney v. Winnebago* And The State Created Danger Theory Are Sound.

Petitioners recognize that there is "sound policy and constitutional reasons" behind *DeShaney's* holding that the state cannot be held liable for its failure to protect citizens

from private acts of violence. *Brief, pg. 9.* However, Petitioners urge this Court to grant their Petition based upon the contention that the Ninth Circuit's Decision "so narrowly construes" *DeShaney* so as to "remove any accountability" for state agencies who "intentionally refuse to protect citizens from exercising first amendment rights." *Id.* The error in Petitioners' argument in this regard is that the facts in this case simply do establish that Respondent "intentionally refused" to protect Petitioners. To the contrary, "the Sheriff's Department responded innumerable times to the Plaintiffs' approximately 70 reports and Plaintiffs acknowledged the protection that was given during the 1997 and 1998 car rallies." *Pet.App. 47a.* In fact, the record "clearly establishes beyond any possible dispute" that Respondent "invested a great deal of time and resources in responding" to "even the most minor incidents" reported by Petitioners. *Pet.App. 44a, 59a.* To the extent it would be appropriate to review a case where the state "intentionally refused to protect citizens exercising first amendment rights," this is simply not the case.

Setting aside Petitioners' mischaracterization of the record (that Respondent "intentionally refused" to protect Petitioners), the actual inquiry Petitioners urge this Court to address is simply whether "the evolving state created danger theory is sound." For the following three reasons, this Court should not accept review of this case and address whether the "state created danger theory is sound."

First, the state-created danger theory has been applied by circuit courts for many years. This Court has had innumerable opportunities over those years to review whether the state-created danger theory is sound, yet has repeatedly declined to do so. Second, while circuit courts may vary

slightly in their state-created danger theory analysis, the fundamental question answered by the various circuits in applying the state-created danger theory is whether or not the state affirmatively placed the individual in danger. Rather than any type of conflict among the circuits in applying the state-created danger theory, there is a remarkable consistency in the various circuits' separation of those cases in which there is a failure to act/failure to protect by the state, from those cases where the state's actions actual create or enhance the danger to the plaintiff. Finally, and most importantly, Petitioners cannot identify any facts in this case establishing that Respondent created or enhanced any danger to Petitioners. In the absence of any such facts, this case falls squarely within the parameters of *DeShaney*. As such, what Petitioners are really asking this Court to do is reconsider well-established law that the state has no affirmative duty to protect citizens from the acts of private citizens.

Long before *DeShaney*, it was well-established that the Due Process Clause does not imply an affirmative duty for the government to protect citizens from private actors. *See Harris v. McRae,* 448 U.S. 297, 317-18, 100 S. Ct. 2701, 65 L. Ed. 2d 784 (1980). In *DeShaney*, the Court discussed the purpose of the Due Process clause of the Fourteenth Amendment, noting that "[t]he Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. . . . Its purpose was to protect the people from the State, not to ensure that the State protected them from each other." *DeShaney*, 489 U.S. at 195-96. The Court concluded: "As a general matter, then, we conclude that a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." *Id.* at 196-97.

This Court had the opportunity to review both the policy and purpose of *DeShaney*, and the "evolving state created danger theory" in *Town of Castle Rock, Colo. v. Gonzales*. In *Castle Rock,* respondent Jessica Gonzales obtained a restraining order against her estranged husband in Colorado State court. 125 S. Ct. at 2800. The restraining order contained a notice to law enforcement outlining the Colorado statutory/mandatory duties to enforce the order. *Id.* at 2804-05. While this order was in effect, he absconded with his daughters without prior notice. *Id.* at 2801. The police ignored the respondent's repeated requests to apprehend her husband and enforce the order. *Id.* at 2801-02. The police took no action until her husband arrived at the police station, opened fire, and was killed by their return fire. *Id.* "Inside the cab of his pickup truck, they found the bodies of all three daughters, whom he had already murdered." *Id.*

In reversing the Tenth Circuit's finding that Colorado law created an entitlement to the enforcement of the restraining order, this Court noted that "[a]lthough the underlying substantive interest is created by 'an independent source such as state law,' *federal constitutional law* determines whether that interest rises to the level of a 'legitimate claim of entitlement protected by the Due Process Clause.'" *Id.* at 2803-04, *quoting Memphis Light, Gas & Water Div. v. Craft,* 436 U.S. 1, 9, 98 S. Ct. 1554, 56 L. Ed. 2d 30 (1978). The Court found that the mandatory language in the restraining order was insufficient to create an entitlement protected by the Due Process Clause because of the "deep-rooted nature of law-enforcement discretion, even in the presence of seemingly mandatory legislative commands." *Id.* at 2806.

This "law-enforcement discretion" is an essential and important purpose and policy behind *DeShaney*, as it leaves officers and law enforcement agencies with some discretionary authority. That is, the officers need not fear that, in any close case, they must choose between liability for a potential false arrest and liability for a potentially actionable non-arrest. In the instant case, the deputies did respond to Petitioners' requests for officer contact, and exercised their discretion in how to handle Petitioners' calls. Petitioners are simply not satisfied with the level or scope of the response they received and now attempt to impose liability because the deputies "did not criminally cite the teenagers." It is exactly this type of claim that the "sound policy and constitutional reasons" of *DeShaney* are designed to preclude.

## CONCLUSION

Petitioners have not established any compelling reasons for this Court to grant the Petition. Therefore, Respondent respectfully requests that the Petition be denied.

Respectfully submitted,

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